Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1453

NEAL R. WOOLEY, etc. et al.,

Appellants,

v.

GEORGE MAYNARD, et ux.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

BRIEF FOR APPELLEES

RICHARD S. KOHN
Suite 526
733 Fifteenth Street, N.W.
Washington, D.C. 20005

for

The New Hampshire Civil
Liberties Union, Inc.
Three Pleasant Street
Concord, New Hampshire 03301

JACK B. MIDDLETON
R. DAVID DePUY
McLane, Graf, Greene, Raulerson &
Middleton Professional Association
40 Stark Street, Box 326
Manchester, New Hampshire 03105

Attorneys for the Appellees

Of Counsel:

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

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BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the United States District Court for the District of New Hampshire (App. 67-77) is reported at 406 F. Supp. 1381.

JURISDICTION

The judgment of the United States District Court for the District of New Hampshire was entered on February 9, 1976 (App. 77). Notice of Appeal to this Court was

filed by the Appellants on February 17, 1976 (App. 78). The jurisdiction of this Court was properly invoked, under 28 U.S.C. §1253. Probable jurisdiction was noted by this Court on June 21, 1976.

QUESTIONS PRESENTED

I.

Whether principles of *Comity*, *Equity* and *Federalism* bar Mr. Maynard's federal action for declaratory and injunctive relief because he did not appeal prior state court convictions when, at the time the federal suit was filed, no state criminal proceedings were pending against him, the relief sought was prospective only, and no attempt was made to attack collaterally his state court convictions.

II.

Whether the affirmative defenses of *res judicata* and collateral estoppel are properly before the Court and, if so, whether those defenses can be applied to defeat Mr. Maynard's federal action where the constitutional issues were not actually litigated in the state court proceedings and where Mr. Maynard did not elect the state court as his forum.

III.

Whether Mrs. Maynard can be barred from instituting a federal civil rights action by her husband's failure to appeal prior convictions where she has never been prosecuted, but shares her husband's religious conviction

against the motto and has been threatened with prosecution if she operates their motor vehicle with the motto taped over.

IV.

Whether the Maynards' conduct in taping over the motto "Live Free or Die" on their license plates with reflective red tape constitutes symbolic expression protected by the First Amendment which outweighs any countervailing interest advanced by the state for requiring the motto to be displayed on non-commercial license plates.

V.

Whether the requirement that all non-commercial license plates bear the state motto "Live Free or Die" violates the Maynards' right under the First Amendment to be free from compelled affirmations of belief.

VI.

Whether the requirement that the Maynards display the state motto on their license plates violates the Free Exercise Clause of the First Amendment where the message conveyed by the motto is antithetical to their religious conviction that Jehovah guarantees everlasting life.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fourteenth Amendments to the United States Constitution:

U.S. Const. Amend. I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const. Amend. XIV, Sec. 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New Hampshire statutes:

New Hampshire RSA 263:1 "Number Plates"

"Every motor vehicle operated in or on any way in this state shall have displayed conspicuously thereon a number plate or plates to be furnished by the director of the division of motor vehicles. Said director may make special regulations relative to the number of plates, the location of said plate or plates on the vehicle, and the material and design thereof; provided, however, that number plates for non-commercial vehicles shall have the state motto 'live free or die' written thereon. The plates shall be kept clean."

New Hampshire RSA 262:27-c "Misuse of Plates"

"Any person who knowlingly attaches or permits to be attached to a motor vehicle a number plate assigned by the director or authority of any other jurisdiction, to another vehicle or who knowingly obscures or permits to be obscured the figures or letters on any number plate attached to any motor vehicle or who knowingly and deliberately fails to display on a motor vehicle proper lights, as herein provided, or the number plates and the registration number duly issued therefor shall be guilty of a misdemeanor."

STATEMENT OF THE CASE

Since 1969, the State of New Hampshire has required that all number plates for noncommercial vehicles, with some exceptions, bear the state motto, "Live Free or Die." NHRSA 263:1. Under New Hampshire law, it is a misdemeanor knowingly to obscure, or to permit to be obscured, the figures or letters on State issued license plates. NHRSA 262:27-c. The New Hampshire Supreme Court has held that "letters" includes the words of the state motto.[1] The appellees, George and Maxine Maynard, are Jehovah's Witnesses. At the time this suit was commenced they owned two automobiles, a 1971 Toyota and a 1968 Plymouth.[2] The Maynards believe that the message conveyed by the state motto is

[1] *See, State v. Hoskin*, 112 N.H. 332, 295 A.2d 454 (1972).

[2] The Plymouth has been sold. The Toyota is registered in Mr. Maynard's name but the parties stipulated that both the Maynards are owners. Mrs. Maynard's name appears on the note financing the Toyota, her earnings were used to make the car payments and she derives as much use and benefit from the car as Mr. Maynard. (Tr. 5)

repugnant to their religious and political beliefs and refuse to display it on their automobiles.

Beginning in March or April, 1974, Mr. Maynard began covering the words "Live Free or Die" on the license plates of both cars with bright orange or red reflective tape. In May or June, 1974, because neighborhood children kept removing the tape, Mr. Maynard cut out of the license plates the words "Or Die" and covered the resulting hole, as well as the words "Live Free" with tape. (App. 15)*

On November 27, 1974, while driving the Toyota in Lebanon, New Hampshire, Mr. Maynard was issued a summons for obscuring letters on his license plates. The police officer removed the front plate from the car. On the same date, Mr. Maynard was charged by a Lebanon, New Hampshire District Court Complaint with a violation of RSA 262:27-c. The complaint charged that he "did allow the plates to be obscured in that the figures LIVE FREE OR DIE were covered over with a strip of red tape, and the figures OR DIE had been cut away from the plates." (App. 17-18) On December 6, 1974, Mr. Maynard appeared in Lebanon District Court, *pro se*, to answer the charge. He entered a plea of not guilty. He was advised by Judge Lovejoy of his right to counsel but told the court that he wished to represent himself. (App. 33) He then asked Judge Lovejoy for

*"App." refers to the Appendix. "App. Br." refers to the Appellants' Brief. "Tr." refers to the Transcript of the Hearing before the Three-Judge Court.

permission to tape record the proceedings, which request was granted.[3]

After Mr. Maynard explained that the slogan "Live Free or Die" was against his religious teaching and belief, Judge Lovejoy said that he was sworn to uphold the law as set forth by the legislature. (Transcript of Pl. Exh. 3, p. 4) He further explained that he, Judge Lovejoy, had had a similar case which had been appealed to the New Hampshire Supreme Court. Judge Lovejoy interpreted the supreme court's decision in *State v. Hoskin*, 112 N.H. 332, 295 A.2d 454 (1972) to mean that "anybody who tapes over those words, that motto, is, in fact violating the law." (*Id.* 5) After stating that he respected Mr. Maynard's right to worship God as he sees fit, (*Id.* 5) Judge Lovejoy imposed a fine of $25.00 which he suspended. According to Mr. Maynard, "I asked the judge after the sentence if I should make an appeal, and he said it wasn't necessary, because there was nothing to appeal." (App. 34)

On December 28, 1974, Mr. Maynard was charged with a second violation of RSA 262:27-c. Again the charge was that he had covered over the motto with tape and cut out the words "Or Die." (App. 19-20) He appeared in court to answer this charge on January 31,

[3] New Hampshire employs a two-tier system of trial courts. Most misdemeanors are prosecuted in district court with a right to appeal for a trial *de novo* in superior court. Trial by jury is unavailable in district court. Cases are generally prosecuted by a police officer. No official transcript is made. Mr. Maynard's partial tape recording of the proceedings is marked as Pl. Exh. 3. With the consent of the parties, this tape has been transcribed and is attached as an Appendix to this brief. The original has been filed with the Court.

1975.[4] He advised the court that he wished to represent himself (App. 36) and plead not guilty. He was found guilty by Judge Lovejoy and sentenced to pay a $50.00 fine. He was also sentenced to the Grafton County House of Correction for six months but this sentence was suspended. At the same time, Judge Lovejoy vacated the suspension of the fine from December 6, 1974 and ordered Mr. Maynard to pay it. (App. 19-20) Judge Lovejoy told him that if he disagreed with the finding he could make an appeal. (App. 35) After the judge left the courtroom, Mr. Maynard advised the clerk of the court that he could not pay the fines as a matter of conscience. Judge Lovejoy then returned to the bench and made the following finding:

> "1/31/75 – Respondent having refused to comply with the order of this court in the payment of a total fine of $75.00 and having advised the court that his refusal is one of conscience and not of inability to pay because of indigency, Respondent is therefore ordered committed to the Grafton County House of Correction pursuant to RSA 618:9 for 15 days. Stand committed." (App. 20)

[4]Mr. Maynard originally went to court on this charge on January 17, but the case was not heard. While he was in court, a police officer confiscated the remaining number plate on the Toyota. He asked the officer, "How am I going to get home?" The officer replied "That's your problem" and advised Maynard that if he tried to drive the car home, he would radio ahead and have him picked up. Mr. Maynard fashioned plates with his license number on them out of cardboard. In Plainfield, New Hampshire he was stopped by a state tropper and given a summons for violating RSA 262:27-c for failing to display his duly issued number plates. Mr. Maynard had to leave his car with friends and the trooper drove him home. (Tr. 18-19).

Mr. Maynard was taken immediately to the House of Correction where he served his full sentence. He was released on February 15, 1975.

Prior to trial on the second complaint, Mr. Maynard had been charged on January 3, 1975, with a third violation of RSA 262:27-c. (App. 21-22)[5] He was found guilty by Judge Lovejoy on January 31, 1975. This conviction was "continued for sentence."[6]

The present action was instituted on March 4, 1975[7] by Mr. and Mrs. Maynard to obtain a declaratory judgment that RSA 263:1 was unconstitutional on its face and as applied to them insofar as it required them to display the state motto on their license plates and that RSA 262:27-c, by making it a crime to obscure the state motto, violated the First and Fourteenth Amendments to the United States Constitution. The complaint also sought a Temporary Restraining Order and permanent injunctive relief to prevent the appellants from arresting or prosecuting the Maynards in the future for masking the state motto on their license

[5]This third prosecution was not known to counsel at the time the federal action was filed on March 4. The first that counsel learned about this conviction was on April 29, 1975, when the State sent a draft of a Stipulation of Facts with copies of three criminal complaints attached.

[6]The three-judge court held, based upon an explanation offered by counsel for the State at oral argument, that the disposition of "continued for sentence" is a final sentence in this context and that no collateral consequences attach unless the defendant is prosecuted again. *Maynard v. Wooley*, 406 F. Supp. 1381, 1384 (D.N.H. 1976). See App. 63-64. The appellants do not contest this ruling.

[7]The time for appealing any of the prior convictions had expired by this date. 406 F. Supp. at 1384 n.4.

plates.[8] The complaint did not seek to have Mr. Maynard's prior convictions vacated or his arrest records expunged.

On March 11, 1975, the district court (Bownes, J.) issued a Temporary Restraining Order enjoining the defendants (appellants here) (from making further arrests of the Maynards pending a decision of the merits. (App. 13) The court held that irreparable harm to the Maynards was shown by the facts that their objection to the motto was religiously based; that Mr. Maynard had been issued two summonses for misuse of plates and had served fifteen days in jail; that Mr. Maynard had been restricted in his ability to find work and that Mrs. Maynard would be unable to sell jewelry to bring in needed income for the family; that their license plates had been confiscated; and that in the absence of a temporary Restraining Order they would be subject to further criminal penalties. (App. 13).

The hearing on the merits took place on September 22, 1975.[9] During the hearing counsel stipulated that

[8]The appellants have never filed a responsive pleading to the complaint. On March 7, 1975, appellants Clarke and Doyon filed a Motion to Dismiss and a document styled "Objection to Motion for Temporary Restraining Order." The Motion to Dismiss was denied by Judge Bownes on March 11, 1975. (App. 13) The ramifications of this action with regard to the affirmative defense of collateral estoppel are discussed in Section II, *infra*.

[9]The long delay was occasioned by a request by the state that the court postpone the hearing on the merits pending consideration of a bill by the New Hampshire legislature that would have made inclusion of the motto on non-commercial license plates optional with the car owner. The legislation died in committee whereupon the evidentiary hearing was scheduled.

Mrs. Maynard shared her husband's religious views concerning the motto and that she was under a threat of prosecution. (App. 45), *Maynard v. Wooley*, 406 F. Supp. 1381, 1384 n.5 (D.N.H. 1976). On February 9, 1976, the district court entered its Opinion and Order declaring RSA 262:27-c unconstitutional as applied to the appellees. The court granted a permanent injunction against the defendant-appellants preventing them from arresting or prosecuting the Maynards for expressing their dissent from the state motto by taping it over. It is from this judgment that the individually named defendants have appealed.*

SUMMARY OF ARGUMENT

I.

The *Younger* doctrine** does not bar a federal civil rights action for declaratory and injunctive relief against threatened prosecutions even though the federal plaintiff did not appeal prior state court convictions. Principles of comity, equity and federalism are not affected when, at the time the federal suit was filed, no state prosecutions were pending, the relief sought was prospective only, and where no attempt was made to attack collaterally prior convictions. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), requiring the exhaustion of

*This Court's jurisdiction over this appeal under 28 U.S.C. Sec. 1253 is not affected by the repeal of §§2281 and 2282 of Title 28. Section 7 of S. 537 provides "This Act shall not apply to any action commenced on or before the date of the enactment." Cong. Rec. H. 8143 (Daily Ed. August 2, 1976).

**See, *Younger v. Harris*, 401 U.S. 37 (1971).

state remedies, is inapposite where the federal plaintiff does not attempt to substitute the lower federal courts for the state's appellate system. Assuming that the appellants prevail on their theory, the case must be remanded to the district court for a determination of whether it fits within the "extraordinary circumstances" exception to the *Younger* doctrine and whether Mr. Maynard deliberately by-passed state appellate remedies.

II.

Appellants' argument that the permanent injunction issued by the district court was barred by *Younger* was waived by failing to argue it in the lower court and by inadequately briefing it here. Since the *Younger* doctrine is not jurisdictional, but a judicial rule of limitation, the Court should not address this issue *sua sponte*.

Assuming that the issue is properly before the Court, it raises the issue of whether the doctrine of equitable restraint forbids the granting of a permanent injunction against threatened prosecutions in the absence of a showing of bad faith, harassment or other unusual circumstances. Historically, the Court has required only that the traditional standard of irreparable injury be shown to justify such relief. This Court's decision in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), holding that *Younger* does not govern the grant of preliminary injunctions, compels a like holding with respect to permanent injunctions against threatened prosecutions.

III.

Principles of *res judicata* and collateral estoppel do not bar the federal court from considering Mr. Maynard's constitutional claims under the circumstances of this case. In the first place, both affirmative defenses have been waived by the appellants: *Res judicata* by failing to plead it as an affirmative defense, F.R. Civ. P. 8(c), and collateral estoppel by failing to pursue it in the district court. Even if these defenses had been preserved, they were not included in the Questions Presented in appellants' Jurisdictional Statement and have not been adequately briefed. Assuming, *arguendo*, that the issue of collateral estoppel is properly before the Court, it cannot be applied to defeat Mr. Maynard's federal action where the constitutional issues were not actually litigated in the state court proceedings and where Mr. Maynard did not elect the state court as his forum.

IV.

Even if Mr. Maynard's action was barred by his failure to appeal his state court convictions, Mrs. Maynard, who was threatened with prosecution but against whom no prosecutions had been brought, is not precluded from seeking declaratory and injunctive relief. She has Article III standing to maintain such a suit and there is a continuing genuine controversy between her and the defendant-appellants. The principle that two distinct parties may be so closely related that they are both subject to the *Younger* considerations that bind either of them is inapplicable here. This is not a case where the *Younger* requirements could be circumvented

by "artificial niceties" and there was no privity between Mr. and Mrs. Maynard in the circumstances of this case that could deny her access to the federal court for vindication of her claims.

V.

In taping over the motto "Live Free or Die" on their license plates, the Maynards were engaged in symbolic expression protected by the First Amendment. Their action was closely akin to pure speech. They acted out of deep religious conviction and had the intent to convey a particularized message likely to be understood by those who viewed it. The interests advanced by the state for requiring the motto to be displayed on passenger license plates are insufficient to overcome the Maynards' First Amendment rights.

VI.

In addition to their right to express their opposition symbolically, the Maynards have a right protected by the First Amendment to be free from required affirmations of belief. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). They cannot be required to display on their private property an orthodoxy with which they disagree. Contrary to appellants' assertion, the test is not whether observers would impute endorsement of the motto to them. Rather, it is whether they regard the compelled dissemination of the message offensive to their personal convictions.

VII.

Because the Maynards' objection to the motto is based on their religious beliefs, the requirement that they display it on their private property violates the Free Exercise Clause of the First Amendment. The Free Exercise Clause prohibits the application of even neutral regulatory laws having secular aims if they infringe on an individual's religious beliefs. As applied to the Maynards, the enforcement of this law forces them either to follow their religious precepts and forfeit their right to drive or abandon the imperatives of their faith in order to be able to use their automobile. Our Constitution protects against this sort of Hobson's choice. *Sherbert v. Verner*, 374 U.S. 398 (1963).

When the Free Exercise Clause is implicated, the Court must balance the interests of the individual against those of the state. Not only must the state demonstrate a compelling need to intrude on the individual's religious beliefs, but also the individual should be aided by a presumption that the state can satisfy its needs by imposing a lesser burden on the individual. Whether or not a presumption is applied in this case, the state has not sustained its burden of proof.

ARGUMENT

I.

Principles of *Comity*, *Equity* and *Federalism* do not bar Mr. Maynard's federal action for declaratory and injunctive relief even though he did not appeal prior convictions where, at the time the federal suit was filed, there were no pending state prosecutions, the relief sought was prospective only, and no attempt was made to attack collaterally his state court convictions.

A. Introduction

The question brought before this Court by the Appellants is whether the principles of *Younger v. Harris*, 401 U.S. 37 (1971) preclude a federal action for declaratory and injunctive relief where the plaintiff has previously been prosecuted in the state courts and failed to appeal his convictions. Appellants also assert in their brief that the permanent injunctive relief granted by the district court "clearly constitutes the type of *federal interference* which Declaratory Judgment Act [sic] was intended to avoid." (App. Br. 9) While appellees believe that this second issue has not been properly preserved or briefed, it raises the issue left undecided in *Steffel v. Thompson*, 415 U.S. 452 (1974), of whether the doctrine of equitable restraint applies when permanent injunctive relief is sought against threatened prosecutions. To the extent that the *Younger* doctrine is jurisdictional, this Court would have to consider the issue *sua sponte*. But see *Sosna v. Iowa*, 419 U.S. 393, 397 n.3 (1975).

Assuming the Court reaches both arguments, analysis is aided by considering them separately. The issue presented by Appellants' Jurisdictional Statement is whether principles set forth in *Younger v. Harris, supra,* and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), require a federal court to abstain where the federal plaintiff has been convicted in a prior state court prosecution and, "despite the full opportunity to utilize state appellate remedies, has failed to do so."[10] If the appellants were to prevail on this issue, the judgment below granting both declaratory and injunctive relief would have to be reversed and it would be unnecessary to reach the narrower issue.

If the appellees prevail, however, the Court would address the second question, *viz.*, whether the permanent injunction granted by the three-judge court to restrain future threatened prosecutions was improper. Even if the Court were to hold that injunctive relief was barred by *Younger*, it would not affect the validity of the Declaratory Judgment. *Steffel v. Thompson, supra.*

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[10]The issue was first raised by Judge Gignoux in a letter to Judges Bownes and Chief Judge Coffin dated March 24, 1975. On March 26, 1975, Judge Bownes wrote to all counsel enclosing a copy of Judge Gignoux's letter and directed them to brief the issue of the applicability of *Huffman*.

B. The fact that Mr. Maynard did not appeal his prior state convictions does not require that his federal action be dismissed for failure to exhaust state appellate remedies where he does not collaterally attack his convictions.

1. A historical perspective

Prior to the Civil War, the federal courts played an insignificant role in enforcing federal constitutional guarantees against encroachment by state officials. In the wake of the war, however, the subject matter jurisdiction of the federal courts was greatly enlarged. Nationalism was triumphant and state agencies were not trusted to carry out the dictates of federal power. "Sensitiveness to states' rights, fear of rivalry with state courts and respect for state sentiment, were swept aside by the great impulse of national feeling born of the Civil War." Frankfurter and Landis, THE BUSINESS OF THE SUPREME COURT 64 (1928). With the enactment of the Civil Rights Act of 1871 and the establishment of federal question jurisdiction in 1875, Congress created two parallel judicial systems – state and federal – within which citizens could seek vindication of federal constitutional rights.

The effect of the post-Civil War jurisdictional legislation and the decision of this Court in *Ex Parte Young*, 209 U.S. 123 (1908) – permitting federal courts to grant injunctive relief against threatened enforcement of unconstitutional state laws – firmly established the federal courts as the primary forum for adjudicating claims that state actions violate the federal constitution. Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U.L. Rev. 740, 848-857 (1974).

The availability of the federal courts as a forum for deciding these claims is tempered by the notion that "[s]ince the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit State courts to try state cases free from interference by federal courts." *Younger v. Harris*, 401 U.S. 37 (1971). This principle developed out of deference to interests of comity, equity and federalism implicit in our system of dual sovereignties.[11]

The *Younger* line of cases may properly be understood as striking a balance between these competing interests so as not to deprive the plaintiff of a federal forum and not to intrude unduly on the ability of state courts to resolve federal issues. In any given case the tension between these competing policies must be resolved by carefully determining the impact of an assumption of federal court jurisdiction on the interests described above. Nevertheless, as Mr. Justice Brennan said in *Zwickler v. Koota*, 389 U.S. 241, 248 (1967), with reference to the post-Civil War Amendments:

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[11]These are distinct interests. "Comity" refers to the duty of respect owed by federal courts to state courts, arising from "the principle that state courts have the solemn responsibility, equally with the federal courts to guard, enforce, and protect every right guaranteed or secured by the Constitution . . .," *Steffel v. Thompson*, 415 U.S. at 460-61. Federalism is a broader concept, which requires the "National government . . . to vindicate and protect federal rights and federal interests . . . in ways that will not unduly interfere with the legitimate activities of the States." "Equity" implicates those general doctrines which, irrespective of comity and federalism, counsel judges not to grant injunctive relief when the moving party has an adequate remedy at law and will not suffer irreparable injury. *Younger v. Harris*, 401 U.S. at 43-44 (1971).

"In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . . .' *Robb v. Connolly*, 111 U.S. 624, 637. 'We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.' *Stapleton v. Mitchell*, 60 F. Supp. 51, 55; see *McNeese v. Board of Education*, 373 U.S. at 674 n.6. *Cf. Cohens v. Virginia*, 6 Wheat 264, 404."

2. The theory transformed into practice

In *Younger* itself, the Court held that in the absence of a finding of bad faith or other extraordinary circumstances, considerations of comity, equity and federalism preclude federal courts from enjoining a pending state criminal prosecution. In *Samuels v. Mackell*, 401 U.S. 66 (1971), decided the same day, the Court held that these same principles also prevented the granting of a declaratory judgment when a state criminal prosecution was under way. It is clear that the greatest interference with a State court's enforcement of the criminal laws is when a federal court literally snatches the case away from the court by cutting down the statute under which the defendant is charged.

Younger principles apply, therefore, in cases where the federal court is asked to intervene in *pending* state criminal prosecutions. *See, e.g. Kugler v. Helfant*, 421 U.S. 117 (1975); *Allee v. Medrano*, 416 U.S. 802, 817-18 (1974); *Roe v. Wade*, 410 U.S. 113, 126-27 (1973).

A corollary to this principle is that *Younger* applies only where the federal plaintiff seeks to attack his state court conviction. Thus, even where the state proceedings have ended, if the point of the federal suit is to nullify the effects of the state prosecution, federal equitable relief will be denied. *Huffman v. Pursue, Ltd., supra; Hicks v. Miranda*, 422 U.S. 332 (1975).

Finally, the Court has paid deference to the state judicial system by interpreting the concept of "pending" to include situations where the state proceedings are commenced after the federal suit has been filed but before any proceedings of substance have taken place. *Hicks v. Miranda, supra.*

Different principles apply where the purpose of the federal suit is not to nullify state court proceedings, but rather to secure an advance judicial determination of liability. In *Steffel v. Thompson, supra*, that Court addressed the question of whether declaratory relief is precluded when a state prosecution has been threatened but has not yet been brought, and a showing of bad faith enforcement or other unusual circumstances has not been made. The Court held that the relevant principles of equity, comity and federalism "have little vitality" in the absence of a pending state proceeding. *Steffel v. Thompson*, 415 U.S. at 462. With respect to federal declaratory relief the Court said:

> "When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal

proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding. *Cf. Dombrowski v. Pfister*, 380 U.S. 479, 490 (1965)." *Steffel v. Thompson*, 415 U.S., at 462.[12]

3. None of the state interests implicated in the Younger doctrine are present here.

In light of the above stated principles, it is clear that *Younger* is not applicable to the instant case. All parties concede, and the district court found, that no prosecutions were pending against the appellees at the time they sought relief in federal court against future arrests. *Maynard v. Wooley*, 406 F. Supp. at 1384 n.4. None were brought after the federal suit was commenced. *Cf. Hicks v. Miranda, supra.* The suit did not challenge past convictions. It is clearly governed by *Steffel v. Thompson, supra.*

[12]The Court did not decide whether the same reasoning would apply where the federal court is asked to *enjoin* the threatened prosecutions. *Id.* 463 & n.12.

Nevertheless, appellants contend that Mr. Maynard is barred from seeking declaratory or injunctive relief under the Civil Rights Act of 1871 by his failure to appeal any of his three state court convictions. They argue that Mr. Maynard deliberately eschewed a federal declaratory judgment action and "elected" criminal prosecution. His failure to appeal his convictions, in their view, acted as a waiver of his Congressionally granted right to a federal forum thereby triggering *Younger.* Shifting from his conduct to the effect of federal intervention, appellants assert that

> "The action of the District Court [intervention and injunctive relief] effectively nullified the prior state criminal proceedings against appellee Mr. Maynard, condoned his engaging in conduct which the criminal laws of the State of New Hampshire prohibit and infringed upon the sovereign state derived authority of the appellants to administer and enforce the laws as substantive as those constituting the motor vehicle registration system of the State of New Hampshire." App. Br. 13[13]

Primary reliance is placed by the appellants on *Huffman v. Pursue, Ltd., supra.* But *Huffman* held only that after state judicial proceedings have been initiated, the respondent in those proceedings cannot avoid the bar of *Younger* by bypassing state appellate remedies and seeking relief in federal court that would nullify the judgment of the state court. *See, e.g., Huffman v. Pursue, Ltd.*, 420 U.S. at 609; *Sartin v. Commissioner*

[13]This argument taken in its entirety, seems to be an amalgam of *Younger, res judicata* principles and the propriety of a federal court's issuing injunctions against threatened prosecutions. It is literally impossible to discern which argument goes with what theory. Appellees have attempted to delineate the theories and treat each one separately.

of Public Safety, 535 F.2d 430 (8th Cir. 1976). To have held otherwise would permit litigants to substitute the federal court for the state appellate courts, precisely the evil that *Younger* was intended to avoid. The Court also held, not surprisingly, that the rule could not be avoided by deliberately letting the time for appealing the state judgment run. 420 U.S. at 611 n.22.[14]

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[14]*See also Ellis v. Dyson*, 421 U.S. 426 (1975). After being convicted and fined in Municipal Court, on pleas of *nolo contendere*, for violating the Dallas, Texas loitering ordinance, petitioners, rather than seeking a trial *de novo* in County Court which would have exposed them to a larger fine, brought suit in federal court for a declaratory judgment that the ordinance was unconstitutional. Petitioners also sought an injunction to expunge their records of arrests and convictions but sought no injunctive relief to protect them from future prosecutions.

The district court had dismissed the case believing erroneously that *Younger* applies to suits seeking declaratory relief against future prosecutions. In reversing, this Court noted that the district court had no reason "to inquire into the relationship between the past prosecution and the threat of prosecutions for similar activity in the future." *Id.* at 433. Because there was a question as to whether a case or controversy still existed, the Court remanded without considering "such questions as the interaction between the past prosecution and the threat of future prosecutions, and of the potential considerations, in the context of the case, of the *Younger* doctrine, of *res judicata*, of the plea of *nolo contendere*, and the petitioners' failure to utilize the state appellate remedy available to them." *Id.* at 435. The dissenting Justices would have reached the question of "whether a plaintiff may resort to §1983 to attack collaterally his state criminal conviction when he has either knowingly pleaded guilty to the charge or failed to invoke state appellate remedies." *Id.* at 439 (Mr. Justice Powell, dissenting).

Justices White, Powell, Stewart and the Chief Justice would have resolved this issue against the petitioners. 421 U.S. at 437 *et seq.* It is significant that even the dissenting justices did not suggest that plaintiffs' request for *declaratory relief* would be barred by their failure to utilize state appellate remedies.

Appellants would broaden the exhaustion doctrine far beyond the parameters of *Huffman v. Pursue, Ltd.* The rule they propose is that any time a person has had the opportunity to vindicate his constitutional rights in state judicial proceedings (i.e., as a defendant in a criminal prosecution) he would be barred by *Younger* from seeking relief from future prosecutions under the Civil Rights Act. (App. Br. 9-10). Such a doctrine has no justification when examined in light of the state's interests of equity, comity and federalism.

Appellants claim that federal intervention "effectively nullifies" the prior state criminal proceedings against Mr. Maynard. In fact, since Mr. Maynard did not ask that his arrest records be expunged, it has no effect whatsoever on his prior convictions. *See, e.g., Ellis v. Dyson, supra; Preiser v. Rodriguez*, 411 U.S. 475 (1973). Indeed, having arrested and successfully prosecuted Mr. Maynard, New Hampshire vindicated any comity interest which it might advance in connection with the only prosecutions in which Mr. Maynard was involved. To the extent that appellees sought relief from future arrests, this in no way infringed upon any interest of New Hampshire. *See Steffel v. Thompson, supra.*

Appellants also contend that the federal court's action (1) condoned conduct prohibited by New Hampshire law and (2) infringed upon the authority of the appellants, derived from the sovereign, to administer and enforce the motor vehicle registration laws. But the mere fact that a federal court holds state action unconstitutional does not involve a slight to the state's judiciary: Congress expressly gave the federal courts that power in the Civil Rights Act. Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 Harv. L. Rev. 1352, 1360-61 (1970). In fact, this Court has expressly

protected the right of litigants to present their federal constitutional claims in the federal forum even where it is necessary to resolve questions of state law by a prior submission to the state courts. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). *Pullman* type abstention "does not . . . involve the abdication of federal jurisdiction, but only the postponement of its exercise." *Id.* 416. The appellants' theory would restrict the availability, and not just the timing, of the federal forum.

Finally, the appellants argue that since there was "no evidence that the New Hampshire state courts are unable to protect his [Mr. Maynard's] constitutional rights, the exhaustion of state judicial remedies becomes preferable if not mandatory." This argument boils down to the claim that abstention is required simply to give the state courts the first opportunity to vindicate the federal claim. This notion has consistently been rejected by this Court. *See, e.g., Wisconsin v. Constantineau*, 400 U.S. 433, 437-39 (1971); *Zwickler v. Koota*, 389 U.S. 241 (1967); *Harman v. Forssenius*, 380 U.S. 528, 534-36 (1965); *Monroe v. Pape*, 365 U.S. 167 (1961).[15] Only a direct interference with a criminal prosecution or an attack on the judgment will implicate interests of equity, comity and federalism requiring federal court

[15]In their brief the appellants purport to distinguish *Zwickler v. Koota, supra*, on the ground that there "the challenged state statute was not susceptible to a narrowing state court construction." (App. Br. 10) Appellees do not understand the appellants to argue that this case is appropriate for *Pullman* type abstention. In fact, the New Hampshire Supreme Court's decision in *State v. Hoskin, supra*, removes the possibility of a narrowing state court construction of the statute that would avoid constitutional questions.

abstention.[16] *Cf. Preiser v. Rodriguez*, 411 U.S. at 490-91; *Florida State Board of Dentistry v. Mack*, 401 U.S. 960, 961 (1971) (Burger, C. J. and White, J., dissenting from denial of *certiorari*); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

C. Issues requiring a remand if the appellants prevail on their argument.

Assuming, *arguendo*, that the Court holds *Younger* applicable where no collateral attack is made on a state conviction, the case would have to be remanded to the district court for determination of two questions. The first is whether the facts bring the case within the "extraordinary circumstances" exception of *Younger*. The second is whether Mr. Maynard deliberately bypassed state appellate remedies.

1. This case comes within the "extraordinary circumstances" exception to the *Younger* doctrine because threat against the federal rights sought to be protected could not be eliminated by defending against a single state prosecution.

Even if there had been a pending prosecution, *Younger* would not have barred Mr. Maynard's federal

[16]Appellants argue that the federal court intervention "... has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws. *Huffman*, 420 U.S. at 605." This partially quoted language from *Huffman* was in the context of discussing the applicability of *Younger* to a civil procedure designed to help the state enforce its criminal obscenity statutes.

action. He was faced with irreparable injury in the sense that the threat against his federally protected rights was one that could not be eliminated by defending against a single criminal prosecution. *Younger v. Harris*, 401 U.S. at 46. Mr. Maynard was being subjected to a series of repeated prosecutions for actions required by his religious beliefs. His choices were to abjure his religious beliefs, give up his ability to earn a living, or to leave the state. The irreparable injury was both "great and immediate."

Moreover, New Hampshire's two-tier system of trial courts does not afford "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). First, the Maynards desperately needed temporary injunctive relief so that they could operate their automobiles while the merits of their claims were being litigated. The criminal appellate system offered no procedural mechanism for doing this. Second, a transfer of questions direct to the New Hampshire Supreme Court from the trial court would have been inadequate due to the absence of a transcript. This Court has often indicated that questions of constitutional dimension frequently turn in the final analysis on questions of fact. *Oregon v. Mitchell*, 400 U.S. 112, 246 (1970) (Brennan, J., dissenting). Under these circumstances the injury to Mr. Maynard was far beyond the mere "cost, anxiety and inconvenience of having to defend against a single criminal prosecution." 401 U.S. at 46.

2. If the failure to exhaust state appellate remedies does trigger *Younger* where prior convictions are not collaterally attacked, the case would have to be remanded to the district court for fact finding on the question of whether Mr. Maynard deliberately by-passed state appellate remedies.

Assuming that appellants' theory has any credence, it is apparently predicated on the assumption that Mr. Maynard deliberately by-passed the state appellate process. Thus, on page 7 of their brief, appellants claim that ". . . during the course of each trial Mr. Maynard elected neither to request the reservation and transfer of constitutional issues directly to the New Hampshire Supreme Court nor to appeal his convictions to the superior court."[17]

In neither of Mr. Maynard's court appearances on December 6, 1974 or January 31, 1975 was he represented by an attorney. At the conclusion of his first trial his sentence was suspended so there was no reason to appeal. At the conclusion of his second trial he was taken to jail immediately. Mr. Maynard, a layman with a ninth grade education, (App. 37) should not be chargeable with notice of the complexities of transferring questions to the Supreme Court or filing

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[17]The argument also seems to be based on the premise, rejected by the three-judge court, that Mr. Maynard actually litigated the constitutional issues in the Lebanon District Court. (App. Br. 9); *Maynard v. Wooley*, 406 F. Supp. at 1385 n.6. (*obiter dictum*)

appeals.[18] In any event, the lower court had no occasion to make findings of fact on this issue. Should it become necessary, the appropriate course would be to remand it to the district court. See *Ellis v. Dyson, supra.*

D. The doctrine of equitable restraint does not bar a federal court from granting a permanent injunction against threatened prosecutions.

The district court in *Maynard v. Wooley, supra,* observed that "[d]efendants do not dispute that the *Younger* doctrine permits federal injunctive relief against threatened arrests and prosecutions." 406 F. Supp. at 1385. Indeed, the only issue advanced by the

[18]New Hampshire law provides that a defendant may appeal to the Superior Court for a trial *de novo* at the time sentence is declared in the district court. The appeal must be entered by the next return day unless the time is extended by the Superior Court for good cause shown. NHRSA 599:1. If the defendant fails to take an appeal, then within 3 days of the date sentence is declared, a written petition may be filed with the district court for permission to enter a late appeal. NHRSA 599:1-a. The petition shall be granted provided the appellant or his attorney appears at the next court session to post bail. NHRSA 599:1-a. A person prevented from taking an appeal "through mistake, accident or misfortune, and not from his own neglect," has 30 days to petition the Superior Court after sentence is declared for permission to appeal. NHRSA 599:1-b. The granting of such appeals is discretionary with the court. NHRSA 599:1-b. An appeal bond must be posted in an amount not to exceed $2,000 as determined by the Court. NHRSA 599:2. The effect of the appeal is to vacate the judgment and transfer the case to Superior Court for a trial *de novo. See State v. Green*, 105 N.H. 260, 197 A.2d 204 (1964). Questions of law may also be transferred directly to the New Hampshire Supreme Court from either the district or superior court but only if the presiding justice thinks fit. NHRSA 502-A:17-a; NHRSA 491:17.

appellants below was that the failure of Mr. Maynard to appeal his state court convictions barred him from seeking relief of any kind in the federal courts under *Younger v. Harris, supra,* and *Huffman v. Pursue, Ltd., supra.* Nevertheless, woven into the appellants' brief is the argument that by granting permanent injunctive relief, the district court frustrated principles of equity, comity and federalism (Summary of Argument, App. Br. 5). Threads of this argument also appear on pages 9 and 13 of Appellants' brief. The issue has been waived in the district court and inadequately briefed here. Sup. Ct. Rules 40(1)(d)(2); 40(5). Moreover, unless it can be said to be fairly comprised within the questions presented by the appellants in their Jurisdictional Statement, it is not properly before this Court. These obstacles can only be overcome if the *Younger* issue is jurisdictional and therefore cognizable by the Court *sua sponte. Philbrook v. Glodgett* 421 U.S. 707, 721 (1975).

The essence of jurisdiction is the power to affect legal relations. The power of federal courts to adjudicate controversies is defined by Art. III of the Federal Constitution and the statutes enacted by Congress to permit them to hear certain types of cases. The Court's power to hear the instant case is found in 28 U.S.C. §1343. Congress has enacted a statutory bar to the jurisdiction of federal courts to issue injunctions to stay proceedings in state courts. 28 U.S.C. §2283. However, suits brought under 42 U.S.C. §1983 are exempt from this enjoinder. *Mitchum v. Foster,* 407 U.S. 225 (1972). *Younger* itself makes clear that the rule enunciated in that case was a judicial doctrine of limitation going to the propriety, and not the power, of Federal injunctive relief. 401 U.S. at 43. *See, e.g., Huffman v. Pursue, Ltd.,* 420 U.S. at 613 n.1 (Mr.

Justice Brennan, dissenting); *Douglas v. Jeannette*, 319 U.S. 157, 162 (1943); *McCune v. Frank*, 521 F.2d 1152, 1157 n.15 (2d Cir. 1975). Accordingly, this issue should be treated as waived.

Assuming the issue is properly before the Court, it poses the question expressly left undecided in *Steffel v. Thompson, supra,* and *Allee v. Medrano*, 416 U.S. at 820 n.15, *viz.*, do *Younger* principles restrict the granting of permanent injunctive relief against threatened prosecutions?

In addition to a declaratory judgment, the appellees' complaint requested preliminary and permanent injunctive relief against threatened prosecutions.[19] After hearing on March 7, 1975, Judge Bownes issued a Temporary Restraining Order granting the preliminary relief requested by the Maynards. This was clearly proper. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

In conjunction with its declaratory judgment that RSA 262:27-c was unconstitutional as applied to the Maynards, the three-judge court issued a permanent injunction. The court enjoined the defendants from arresting or prosecuting the plaintiffs at any time for covering over the state motto. Although the court believed that the state could easily issue the plaintiffs license plates that did not contain the motto, it

[19]Appellees requested a preliminary injunction that the defendants be restrained from arresting or prosecuting them if they covered over the state motto on their new (1975) plates. Alternatively, they sought an injunction to prevent defendants from confiscating their number plates in the event they were issued more summonses during the pendency of the litigation. The complaint also sought permanent injunctive relief against the Commissioner of Motor Vehicles to require him to issue them number plates without the state motto in the event they prevailed on the merits. It further requested that the preliminary injunction be made permanent. (App. 9-10).

declined to make such an order out of deference to the State. The court explained that the relief ordered should fully protect the plaintiffs in the exercise of their First Amendment rights without any further interference with the operation of New Hampshire's system of vehicle identification.

Despite this Court's adherence to the maxim that federal courts should be slow to act "where its powers are invoked to interfere by injunction with threatened criminal proceedings", *Douglas v. Jeannette*, 319 U.S. at 162, historically the rule has been honored more in the breach than in the observance. Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U.L. Rev. 740 (1974). The most that can be said is that in different epochs the Court has applied the traditional standard of irreparable injury with greater or lesser elasticity. *Id.*; Note, 72 Colum. L. Rev. 874 (1972). In *Younger v. Harris, supra,* the Court referred to six cases involving threatened prosecutions where the Court had failed to find irreparable injury.[20] These cases do not signal the creation of a new standard of irreparability but simply underscore the point that intrusions into state criminal proceedings are never to be taken lightly. In fact, the Court pointed out that in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), a seminal case regarding federal court injunctions against threatened criminal prosecutions in the First Amendment area, the plaintiffs had alleged a basis for equitable relief under "long-established standards." *Younger v. Harris*, 401 U.S. at 50.

[20]*Fenner v. Boykin*, 271 U.S. 240 (1926); *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89 (1935); *Beal v. Missouri Pacific Railroad Co.*, 312 U.S. 45 (1941); *Watson v. Buck*, 313 U.S. 387 (1941); *Williams v. Miller*, 317 U.S. 599 (1942); *Douglas v. Jeannette*, 319 U.S. 157 (1943).

Plainly, different interests are implicated when a federal court is asked to grant injunctive relief against threatened, as opposed to pending, state prosecutions. Note, 45 S. Cal. L. Rev. 847, 869-70 (1972); Note, 72 Colum. L. Rev., *op cit.* at 892-93. Even though irreparable injury is still necessary for injunctive relief, it should not be of the same magnitude as that required for intervention in pending actions. *Lake Carriers Association v. MacMullan*, 406 U.S. 498 (1972), decided after *Younger*, removes any doubt that in the absence of a pending prosecution, permanent injunctive relief is proper whenever the plaintiff meets the usual standard of irreparable injury. Note, 48 N.Y.U.L. Rev. 965, 975-79 (1973).

In *Doran v. Salem Inn, supra*, the Court held that the grant of a preliminary injunction by a federal court is not subject to *Younger* restrictions where no criminal prosecution had been brought at the time the injunction issued. After reaffirming the right of the litigants to challenge the constitutionality of state statutes in federal court, the Court summarized the reasons for its holding that the plaintiff's claim for a preliminary injunction should be considered without regard to *Younger.* These included the facts that (1) no state proceedings were pending against the plaintiffs at the time the district court issued its preliminary injunction; (2) there was no question that they satisfied the requirements of federal jurisdiction; (3) ordinarily the practical effect of injunctive and declaratory relief will be virtually identical; (4) prior to final judgment there is no established declaratory remedy comparable to a preliminary injunction and that unless preliminary injunctive relief is available, plaintiffs in some situations may suffer unnecessary and substantial irreparable harm and (5) "neither declaratory nor injunctive relief can

directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs and the state is free to prosecute others who may violate the statute." *Id.* at 931.

With one exception, the policy reasons discussed in *Doran* are equally applicable to the permanent injunction sought in the instant case. First, the injunction issued by the district court did not interfere with any on-going state criminal proceedings. The decree was not directed at state prosecutors or state judges and enjoined the defendants only from arresting the plaintiffs or instituting prosecutions against them. *Allee v. Medrano*, 416 U.S. at 817 n.11. Second, no state proceedings were pending against the Maynards at the time the court issued its injunction. Third, the Court's observation that the practical effect of injunctive relief will be virtually identical to declaratory relief is equally applicable to permanent injunctions. Obviously, there may be instances where injunctive relief will be more abrasive, but this is not such a case. The fact than an injunction would subject the defendants to the contempt power if they violate the court's order is not different whether preliminary or permanent injunctive relief is sought. Fourth, it is true that during the preliminary stages of litigation there is no alternative to a preliminary injunction if litigants are to be protected against irreparable injury.[21] Furthermore, when a declaratory judgment is entered, the

[21] In fact, Judge Bownes issued a Temporary Restraining Order so that the Maynards could drive their cars without fear of arrest pending resolution of the case on the merits. If he had not done so, the Maynards would have been without transportation from March 1975 when the complaint was filed until February 1976 when the case was decided.

"stronger" injunctive "medicine" may be unnecessary. However, this is a matter that should be left to the sound discretion of federal judges applying the traditional standard of irreparable harm.[22]

Finally, a permanent injunction, where a statute is held unconstitutional as applied to the plaintiffs, only interferes with the enforcement of the statute with respect to the particular plaintiffs, and the state is free to prosecute others who may violate the statute. *See Steffel v. Thompson*, 415 U.S. at 474.

The appellants argue that permanent injunctive relief constitutes the type of interference which the Declaratory Judgment Act was intended to avoid. (App. Br. 9) However, when Congress empowered the federal courts to grant the new remedy of the Declaratory Judgment in 1934, it was "without expanding or reducing the subject matter jurisdiction of the federal courts, or in any way diminishing the continued vitality of *Ex parte Young* with respect to federal injunctions." *Perez v. Ledesma*, 401 U.S. 82, 111 (1971) (Opinion of Mr. Justice Brennan). *See Lake Carriers Association v. MacMullan*, 406 U.S. at 509-510.

When a federal court issues a permanent injunction against an ongoing state prosecution, the impact on the state court system is dramatic. This drastic interference with the state judiciary arguably justifies the rigorous standard of "bad faith" and harassment that must be met. Even though concerns of federalism are not limited to suits seeking to enjoin criminal prosecutions

[22]In *Doran*, this Court characterized the traditional standard as "stringent" and pointed out that even a preliminary injunction "seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger*." Federal Judges can be expected to give this ample consideration before granting permanent injunctions.

in progress, that is the area in which principles of federalism are entitled to "their greatest weight." *Rizzo v. Goode*, 423 U.S. 362, 380 (1976). Federal courts should continue to have discretion to grant injunctions against threatened prosecutions using the traditional standard of irreparable harm at least where the statute is held unconstitutional as applied.

The issue before an appellate court is whether the issuance of the injunction in light of the applicable standard constitutes an abuse of discretion. *Doran v. Salem Inn, Inc., supra.* No abuse of discretion is claimed by the appellants in their brief. In any event, the injunction issued by the three-judge court was exceedingly narrow. It was in the context of repeated prosecutions having been brought against Mr. Maynard for conduct which he believed was compelled by his religious beliefs. Mr. Maynard's dilemma could not be resolved by defending against a single prosecution. Mrs. Maynard, too, was threatened with prosecution. Preliminary injunctive relief had already been granted on evidence that enforcement of the law against the Maynards had threatened their livelihood. Mr. Maynard had spent fifteen days in jail as the result of his prior convictions. The court did not, by its injunction, thrust itself into the internal affairs of the Department of Motor Vehicles. Rather, in framing its order, the court specifically declined to require the State to provide the Maynards with plates free of the motto so as to minimize interference with the system of vehicle registration. Under the circumstances, there was no abuse of discretion.

II.

Principles of *res judicata* and collateral estoppel do not bar the federal court from considering the appellees' constitutional claims.

A. Introduction

The appellants contend that the doctrines of *res judicata* and collateral estoppel barred the district court from adjudicating the appellees' claims because Mr. Maynard failed to utilize the State's appellate machinery. (App. Br. 9) Assuming, *arguendo*, that the appellants had properly preserved these issues, neither doctrine would be applicable in the circumstances of this case.

B. The appellants failed to raise the affirmative defense of *res judicata* in the lower court and thereby waived it.

Affirmative defenses must be raised by a responsive pleading at the trial level.[23] F.R.Civ.P. 8(c). *Res judicata* is an affirmative defense. On March 7, 1975, prior to the designation of a three-judge court, the appellants filed a motion to dismiss in which they raised the defense of collateral estoppel. (App. 11). This motion did not raise the defense of *res judicata*. No

[23]Although Rule 8(c), F.R.Civ.P. specifies that the defense must be raised in a responsive pleading, it is now generally recognized that it may be made by motion. 2A J. Moore, *Federal Practice*, ¶8.28 at 1863 (2d ed. 1975); 5 C. Wright & A. Miller, *Federal Practice & Procedure* §1277 (1969).

answer was ever filed and the issue of *res judicata* was never presented to the three-judge court, either in the extensive brief filed by the appellants or in oral argument. While the term *res judicata* is sometimes used in its generic sense to include collateral estoppel,[24] the converse is not true. The failure of the appellants to raise *res judicata* in their motion to dismiss constitutes a waiver. F.R.Civ.P. 8(c); *Huffman v. Pursue, Ltd.*, 420 U.S. at 607 n.19 (1975).

C. The affirmative defense of collateral estoppel was waived by the appellants' failure to pursue it before the three-judge court and by their failure to include it in their Statement of Questions Presented in their Jurisdictional Statement.

As indicated above, the affirmative defense of collateral estoppel was raised by the appellants' Motion to Dismiss dated March 7, 1975. (App. 11) On March 11, 1975, after hearing, Judge Bownes issued a Temporary Restraining Order and denied the Motion to

[24]*Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 n.6 (1955); *Mastracchio v. Ricci*, 498 F.2d 1257, 1259 n.1 (1st Cir. 1974); *Palma v. Powers*, 295 F. Supp. 924, 932 n.1 (N.D. Ill. 1969).

Dismiss.[25] The appellants never renewed their claims of collateral estoppel before the three-judge court. Their extensive brief filed September 1, 1975, did not list it as one of the "Issues Presented." Nor did the appellants allude to the issue of collateral estoppel during oral argument on September 22, 1975. Only in exceptional circumstances, not present here, does this Court review a question not properly raised in the court below. *Eastlake v. Forest City Enterprises, Inc.*, ___ U.S. ___, 49 L.Ed.2d 132, 136 nn.2,3 (1976); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957).

Moreover, the appellants have not included collateral estoppel as an issue for review in their Jurisdictional Statement filed in this Court. Supreme Court Rules 15(1)(c). There are no exceptional circumstances in this case that should lead the Court to depart from its

[25]28 U.S.C. §2284 states, *inter alia*, that a single judge shall not "hear and determine" a motion to dismiss the action in a case required to be heard by a three-judge court. Judge Bownes denied the State's motion to dismiss before the three-judge court was convened. It is unclear whether the single judge under these circumstances has power to determine the validity of an affirmative defense. To the extent that it would affect the ability of the three-judge court to fashion relief it may be permissible. *ACLU of Maryland v. Board of Public Works*, 357 F. Supp. 877, 883, (D. Md. 1972). Even assuming the single judge should have reserved the collateral estoppel issue for consideration by the full court, the appellants waived any possible argument that Judge Bownes acted improperly. 28 U.S.C. §2284 (5) specifically provides that the action of the single judge shall be reviewable by the full court at any time before final hearing. Alternatively, the appellants could have appealed the action to the U.S. Court of Appeals for the First Circuit before the three-judge court was convened. *See, e.g., Hicks v. Pleasure House, Inc.*, 404 U.S. 1 (1971); *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962). They failed to do this.

consistent practice of declining to review questions that are not included in the Jurisdictional Statement. *See, e.g., Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 386 n.12 (1960); *Irvine v. California*, 347 U.S. 128, 129 (1954); *General Talking Pictures Co. v. Western Electric Co.*, 304 U.S. 175, 177-79 (1938). *See also Aldinger v. Howard*, U.S. ___, 49 L.Ed.2d 276, 280 n.3 (1976); *Flint Ridge Development Co. v. Scenic Rivers Association*, ___ U.S. ___, 49 L.Ed.2d 205, 214 n.6 (1976); *Eastlake v. Forest City Enterprises, Inc.*, 49 L.Ed.2d at 140 n.11. R. Stern & E. Gressman, SUPREME COURT PRACTICE, ¶6.37 at p. 297; ¶7.15 at 352 (4th ed. 1969).

Nor is collateral estoppel a "subsidiary question fairly comprised" within the issue presented for review. Supreme Court Rule 40(1)(d)(1). The question appealed by the appellants is "whether federal intervention in a state criminal proceeding is precluded where the defendant has had a full opportunity to utilize state appellate remedies and has failed to do so." (App. Br. 2). The *Younger* doctrine concerns itself with the relationship between the state and federal courts and problems of comity, etc., that arise where a federal court is asked to inject itself into an ongoing effort by the state to enforce its criminal laws. This is the issue raised and discussed by the appellants in their Jurisdictional Statement, in which they cited *Huffman v. Pursue, Ltd., supra*, and *Kugler v. Helfant, supra*.

Collateral estoppel, on the other hand, addresses the question of whether a thorough and determinative consideration of the same issue in a previous action, whether appealed or not, bars reconsideration in a subsequent suit between the same parties. While considerations of comity may be involved, its primary purpose is to avoid repetitious trials, end litigation,

make a final determination of controversies and avoid conflicting adjudications between the same parties. These issues are separate and distinct from those raised by *Younger* and its progeny.

Briefs in the Supreme Court may not raise additional questions or change the substance of the questions already presented in the Jurisdictional Statement. Supreme Court Rules 40(1)(d)(2). Appellants should not be permitted to resurrect this abandoned affirmative defense at this stage of the proceedings.

Finally, the question of whether collateral estoppel (issue preclusion) is applicable in cases brought under 42 U.S.C. §1983 is one which has never been considered by this Court. *Ellis v. Dyson*, 421 U.S. 426, 440 n.6 (1975); *Preiser v. Rodriguez, supra; Florida State Board of Dentistry v. Mack, supra* (*res judicata*). Resolution of that question presents difficult questions that deserve careful and thorough treatment. Except for citing two cases, *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972) *cert. denied* 410 U.S. 930 (1973) and *Mastracchio v. Ricci*, 498 F.2d 1257 (1st Cir. 1974) *cert. denied* 420 U.S. 909 (1975), appellants have failed to brief their argument. Inadequate briefing is cause for the Court to refuse to consider the issue sought to be raised. *See, e.g., Philbrook v. Glodgett*, 421 U.S. at 721; Supreme Court Rules 40(1)(g); 40(2) & (5).[26]

[26]The three-judge court stated, *obiter dictum*, that even if the collateral estoppel argument had been made, it would have been rejected. *Maynard v. Wooley*, 406 F. Supp. at 1381, 1385 n.6.

D. Assuming that the issue of collateral estoppel is properly before the Court, that doctrine does not act as a bar to federal declaratory and injunctive relief in the circumstances presented by this case.

1. Introduction

The lower federal courts have adopted widely varying approaches to the question of whether principles of *res judicata* and collateral estoppel are applicable in the context of suits commenced under section 1983. Some have suggested that application of the doctrines would make the Civil Rights Act a "dead letter." *Ney v. California*, 439 F.2d 1285, 1288 (9th Cir. 1971). Others have considered the availability of habeas corpus to obtain a federal forum decisive in satisfying the Congressional concerns underlying the Civil Rights Act.[27] *See, e.g., Moran v. Mitchell*, 354 F. Supp. 86, 88-89 (E.D. Va. 1973). Still others have argued that there is greater justification for application of the preclusion rule where a guilty plea has been entered in a previous criminal trial. *Metros v. U.S. District Court for District of Colorado*, 441 F.2d 313, 316-317 (10th Cir. 1971). Crucial questions may turn on whether the prior case was civil in which the federal plaintiff voluntarily appeared, *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972) *cert. denied*, 410 U.S. 930 (1973) or criminal, in which he lacked any choice in the matter.

[27]At the time Mr. Maynard filed his action under section 1983, habeas corpus was no longer available to him. In any event, since his primary concern was relief against future prosecutions, habeas corpus was not an appropriate remedy.

Palma v. Powers, 295 F. Supp. 924 (N.D. Ill. 1969). *See* Dorsen, Bender & Neuborne, *Political and Civil Rights in the United States*, 4th ed. vol. 1 at 1376-77 (Law School ed. 1976); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II*, 60 Va. L. Rev. 250 (1974); Vestal, *State Court Judgment as Preclusive in Section 1983: Litigation in Federal Court*, 27 Okla. L. Rev. 185 (1974); Comment, *The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions*, 1975 Ill. Law Forum 95 (1975); Note, 53 Va. L. Rev. 1360 (1967). The issues do not lend themselves to a "bright line" rule. Each situation must be given separate consideration.

Even assuming that section 1983 suits are not entitled to greater immunity than ordinary cases, surely they are not entitled to less. This is particularly true in the context of criminal convictions.

> "While considerations of state-federal comity and judicial efficiency may dictate that a civil rights action be dismissed when the alleged deprivation has been examined fully during a state criminal trial or has been waived by the complainant, the simple fact of an unreversed state conviction cannot by itself require dismissal." *Mulligan v. Schlachter*, 389 F.2d 231, 233 (6th Cir. 1968).

Accord, Wecht v. Marsteller, 363 F. Supp. 1183, 1190 (W.D. Pa. 1973); *Kauffman v. Moss*, 420 F.2d 1270, 1273 (3rd Cir. 1970) *cert. denied*, 400 U.S. 846 (1970). *Cf. Ney v. California, supra; Moran v. Mitchell*, 354 F. Supp. 86 (E.D. Va. 1973); *Ames v. Vavreck*, 356 F. Supp. 931 (D. Minn. 1973).

This case does not require the Court to determine the broad question of whether collateral estoppel[28] applies at all in section 1983 actions. Assuming, *arguendo*, that it does, the doctrine would not bar Mr. Maynard's action on the instant facts.

The First Circuit has applied the rule that in the criminal context, collateral estoppel bars only issues actually litigated. *Compare Mastracchio v. Ricci, supra*, with *Lovely v. Laliberte*, 498 F.2d 1261 (1st Cir. 1974) (*res judicata*).[29] Apparently, the appellants do not quarrel with the legal principles articulated by the Court in *Ricci*, but rather contend that Mr. Maynard actually "raised and litigated" his constitutional claims in the state court. The proper course is to examine "the

[28]As pointed out above, *res judicata* (or claim preclusion) was waived. If the present case were on the same cause of action, it would not be necessary to consider the effect of collateral estoppel which applies only where the second suit is on a different cause of action. Since Mr. Maynard was prosecuted both for masking the motto and cutting out the words OR DIE, and for the further reason that his convictions were for offenses committed on specific dates which are not in issue here, it seems clear that this case involves a different cause of action. In any event, appellees proceed on that assumption for purposes of this argument.

[29]*Emich Motors v. General Motors Corp.*, 340 U.S. 558, 568-69 (1951); *Cromwell v. County of Sac*, 94 U.S. 351 (1876). The Court need not determine whether a federal court should apply federal principles of collateral estoppel or the doctrine as it is applied by the state in which the court sits. See 28 U.S.C. §1738. New Hampshire applies the rule that a party is collaterally estopped only as to issues actually litigated and not as to issues which might have been litigated in the state court action. *Ainsworth v. Claremont*, 108 N.H. 55, 226 A.2d 867 (1967); *McGrath v. McGrath*, 109 N.H. 312, 251 A.2d 336 (1969); *Archie v. Piaggio & Co.*, 109 N.H. 162, 245 A.2d 76 (1968).

record of the antecedent criminal case to determine the issues decided by that judgment." *Cardillo v. Zyla*, 486 F.2d 473, 475 (1st Cir. 1973). Reasonable doubt as to what was decided in the prior case must be resolved against using it as an estoppel. *Kauffman v. Moss*, 420 F.2d 1270, 1274 (3rd Cir.) *cert. denied*, 400 U.S. 846 (1970). The courts have held that there can be no collateral estoppel where a certified copy of the transcript from the prior proceedings is lacking. *Basista v. Weir*, 340 F.2d 74, 81-82 (3rd Cir. 1965); *Kauffman v. Moss*, 420 F.2d at 1274; *Williams v. Liberty*, 461 F.2d 325 (7th Cir. 1972); *Cf. Ames v. Vavreck*, 356 F. Supp. at 941.

2. The constitutional issues presented in Mr. Maynard's federal civil rights action were not actually litigated in the state misdemeanor proceedings.

The record of Mr. Maynard's state court appearances is totally deficient in this respect: it is impossible to say that any constitutional issues were actually litigated. *Sartin v. Commissioner of Public Safety*, 535 F.2d 430, 433 n.4 (8th Cir. 1976) (issues of fact). At the first hearing on December 6, 1974, Mr. Maynard made his own tape recording of the proceedings. He explained to the judge as best he could that it offended his religious beliefs to have the state motto on the licenses plates affixed to his cars. He also made a fleeting reference to freedom of speech. (Transcript of Exh. 3, p. 5) No reference whatsoever was made to symbolic speech or a right to be free from a required affirmation or belief. No reference was made to the legal standards to be applied when such claims are made. The judge advised Mr. Maynard that under *State v. Hoskin* anyone "who tapes over the motto is, in fact, violating the law."

Since, as appellants point out on page 13 of their brief, *Hoskin* did not consider the issue of symbolic speech, it is impossible to conclude that the state judge resolved that issue against him. Nor can Mr. Maynard be faulted for failing to appeal this conviction in view of the fact that his sentence was suspended. As meager as this record is, it surpasses that of Mr. Maynard's second trial on January 31.

On this record, as the three-judge court recognized *obiter dictum*, "the constitutionality of the state statute was not litigated by Mr. Maynard in the state misdemeanor proceedings . . ." *Maynard v. Wooley*, 406 F. Supp. at 1385 n.6; *Accord, Jackson v. Official Rep. and Employees of Los Angeles Police Department*, 487 F.2d 885, 886 (9th Cir. 1973). The effect was the same as if Mr. Maynard had stood "mute" throughout the trial. *See* Note, 88 Harv. L. Rev. 453, 462 (1974). *Compare, Thistlethwaite v. City of New York*, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974) and *Reich v. Freeport*, 527 F.2d 666, 671 & n.11 (7th Cir. 1975) *with Lombard v. Board of Education*, 502 F.2d 631 (2d Cir. 1974).

3. Mr. Maynard did not "elect" the state court as his forum.

Section 1983 embodies a strong federal policy of assuring litigants the option of a federal forum to seek redress for asserted constitutional wrongs committed under color of state law. *Monroe v. Pape*, 365 U.S. 167 (1961). Whatever the implications where persons voluntarily bring suit in state court, *see Bricker v. Crane, supra*, to apply collateral estoppel to deny a full federal hearing to those who cannot be considered to have elected to litigate their federal claims in state

court would defeat the policy underlying section 1983. *See generally*, Note, 88 Harv. L. Rev. 453, 460 (1974); *England v. Louisiana State Board of Medical Examiners*, 375 U.S. at 419.

Appellants make the astonishing claim that, by his conduct, Mr. Maynard deliberately opted against a federal action for declaratory relief and "elected" instead criminal prosecution in the state courts. (App. Br. 10). There is no evidence that Mr. Maynard had ever heard of the Civil Rights Act of 1871 much less that he deliberately decided against a federal remedy. To accept this theory would impute knowledge of federal procedure, which few lawyers understood, to a layman. To suppose that Mr. Maynard consciously chose to be prosecuted, appeared in court without counsel, and refused to pay the accumulated fines knowing it meant separation from his family and imprisonment carries its own refutation. Mr. Maynard's unsophisticated attempt to explain the religious basis for his actions to the judge can in no way be interpreted as a decision on his part to litigate his federal constitutional claims in the state courts. An explanation of one's religious beliefs should not be confused with the presentation of a legal theory to excuse one's conduct from the operation of the criminal laws. *See Thistlethwaite v. City of New York*, 497 F.2d at 342.

III.

Even if Mr. Maynard is barred from seeking relief in the federal court, Mrs. Maynard, who was under the threat of prosecution but against whom no prosecution was brought, may maintain a suit for declaratory and injunctive relief.

Appellants contend that Mrs. Maynard's action must be dismissed because she failed to prove a *prima facie* case under 42 U.S.C. §1983. They claim that if she had sought relief under the Declaratory Judgment Act, 28 U.S.C. §2201, her threshold burden would have been to demonstrate a continuing actual controversy. "Since she failed to request such relief," the theory goes, she was required to "show that the appellants had subjected her to the deprivation of her First Amendment right to freedom of speech." (App. Br. 14) Based upon this perceived distinction, the appellants "do not address herein the issue of whether a genuine controversy exists between Mrs. Maynard and the Appellants." *Id.* 15.

Appellants' argument betrays total confusion regarding the nature of this case. Plaintiffs' complaint sought "declaratory and injunctive relief under 42 U.S.C. §1983." (App. 5) Jurisdiction was based on 28 U.S.C. §1343. Since the Declaratory Judgment Act was not jurisdictional, it was not necessary to designate it by statutory citation in the complaint. *Younger v. Harris*, 401 U.S. at 41 n.2; F.R.Civ.P. 8(a).

Appellants cite no source for their unique theory concerning declaratory judgments brought under 42 U.S.C. §1983. None exists. There is no requirement, statutory or otherwise, that in order to obtain declaratory relief Mrs. Maynard would have to demonstrate that the appellants had clearly subjected her to a

deprivation of First Amendment rights. Moreover, this argument was not made in the district court.

Since appellants have not briefed the issue of whether a genuine controversy exists, it is only necessary to point out that the requirements of Article III of the United States Constitution were met. The standard is whether the plaintiff "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged statute or official conduct. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Where a prosecution has been threatened the continuing existence of a live and acute controversy must be shown. *Steffel v. Thompson*, 415 U.S. at 459.

Mrs. Maynard is a Jehovah's Witness and shares her husband's religious beliefs. (Transcript of TRO hearing, March 7, 1975, at 25; App. 45). She was a co-owner of the automobiles in question. (App. 14). The plaintiffs stipulated that Mrs. Maynard would testify that she "permitted to be obscured these words on the license plates on the car of which she is co-owner." (App. 46). The state stipulated with respect to both Mr. and Mrs. Maynard that if they do not comply with the laws of the State, there is a threat of prosecution. (App. 24-25) *Maynard v. Wooley*, 406 F. Supp. at 1384 n.5. Mrs. Maynard used the car in her business selling jewelry. She applied for commercial plates and accompanied her husband to the Department of Motor Vehicles in an attempt to obtain plates without the motto. (App. Br. 36). Her husband had been prosecuted and convicted three times for violating RSA 262:27-c and had been jailed for fifteen days because he refused to pay the fines. There was plainly a justiciable controversy between Mrs. Maynard and the appellants. *Compare Steffel v. Thompson*, 415 U.S. 452 (1974) and *Doe v. Bolton*, 410 U.S. 179, 188 (1973) *with Boyle v. Landry*, 401 U.S. 77 (1971) and *Younger v. Harris*, 401 U.S. at 42.

Appellants contend in the alternative that Mrs. Maynard's action is barred by the principle that legally distinct parties may be so closely related that they are all subject to the *Younger* considerations which govern any one of them. *Doran v. Salem Inn, Inc., supra*, relied on by the appellants, suggested that such a situation might be presented where plaintiffs are brother-sister corporations related "in terms of ownership, control and management." *Id.* 928. Although the appellants claim support in the record for the proposition that "Mrs. Maynard's religious actions and beliefs are strongly influenced by her husband", (App. Br. 15), a perusal of the transcript reveals none. In any event the district court held that

> "Here, however, each of the Maynards is acting on his own or her own independently held religious precepts. There is no suggestion that either controls the actions or beliefs of the other." *Id.* 1385.

This is not a case where the requirements of *Younger* could be circumvented by "artificial niceties." *Allee v. Medrano*, 416 U.S. at 833. Nor is this a case where Mrs. Maynard has sought to bring a federal action at the same time that her husband is a defendant in a state prosecution. 416 U.S. at 830 n.6. Thus, even if it were held that Mr. Maynard is barred from federal court by his failure to exhaust state appellate remedies, a federal declaratory judgment obtained by Mrs. Maynard would not interfere with any past state prosecutions against her husband.

In *Hicks v. Miranda, supra*, the state had commenced its prosecution of the theatre employees before the federal action was filed. The Court observed that Miranda's interests obviously were intertwined with those of his employees; Miranda's lawyers represented

the employees and the federal action sought to interfere with the pending state prosecution. In view of those facts, the court indicated that *Younger* should apply unless it were clearly shown that Miranda could not seek the return of his property in the state proceedings or see to it that his federal claims were presented there. Thus, the Court seems to have had a 3 pronged standard in mind: "(1) Would the federal relief prayed for interfere with the state proceedings? (2) Is there privity in the *res judicata* sense between the federal plaintiff and the state defendant? (3) Is it possible for the federal plaintiff to obtain complete relief in the state proceedings?" Note, *The Supreme Court, 1974 Term*. 89 Harv. L. Rev. 47, 159-160 (1975).

A federal declaratory judgment for Mrs. Maynard would not interfere with any past state proceedings against her husband. With respect to the second question, one commentator has suggested the following standard:

> "In determining whether a nonparty's interest in litigating an issue identical to one litigated in a previous action is more or less compelling, the crucial element is the extent to which the nonparty may be thought to have had a vicarious day in court. Two aspects of this question can be identified. First, to what extent did the nonparty participate in or control the prior action; second, to what extent can the issue be said to have been fully and fairly litigated in the first action in a manner which protects the interests of the nonparty." Note, *Collateral Estoppel of Non Parties*, 87 Harv. L. Rev. 1485, 1499-1500 (1974).

The record in this case contains no evidence that Mrs. Maynard participated in or controlled her husband's state court defenses. Second, the little evidence available regarding the presentation and consideration of Mr. Maynard's defense in the state

court can lead to only one conclusion: that the claims which Mrs. Maynard advanced in her federal declaratory judgment action were not fairly presented or passed upon in state court.

Finally, it was not possible for Mrs. Maynard to obtain relief in the prior state proceedings. Even assuming that a prosecution had been pending aganst Mr. Maynard at the time the federal action was filed, it is obvious that she would not be permitted to intervene in his criminal defense. Furthermore, it is crucial to recognize that Mr. Maynard did not have the assistance of counsel at his trials thus creating a wholly different situation than *Hicks* or *Doran*. Mr. Maynard's failure to appeal his state convictions could have no effect on Mrs. Maynard's federal action to protect herself from future threatened prosecutions.

The supreme irony of appellants' argument is their declaration that "it is highly doubtful that Mrs. Maynard would have instituted federal litigation" but for her husband's "religious convictions and criminal conduct." The appellants have previously argued that Mr. Maynard was at fault for "electing" to be prosecuted in state court rather than bringing a federal declaratory judgment action before his arrests. Mrs. Maynard sought to do precisely what the state criticizes her husband for not doing: seek a declaration of her rights before she too was arrested. It is clear that if Mrs. Maynard had been arrested and convicted for violating this law, she would have gone to jail in her own right. Under these circumstances, it would violate due process if her federal declaratory judgment action were barred by her husband's prior convictions. *See Steffel v. Thompson, supra.*

IV.

The Maynards' conduct in taping over the words "Live Free or Die" on their license plates is symbolic speech protected by the First Amendment which outweighs any asserted state interests advanced by the appellants in this case.

A. Introduction

The State of New Hampshire requires most passenger cars to display the State motto "Live Free or Die" on their license plates. The Maynards are conscientiously opposed to that message. The issue presented by this case is whether the State's requirement is unconstitutional as applied to them. This inquiry examines first, whether their conduct can be regarded as symbolic speech within the protection of the First Amendment, and second, whether upon this record, the interests advanced by the State are substantial enough to justify infringement of constitutional rights.

In determining whether the Maynards' conduct in taping over the State motto on their license plates and exhibiting these plates was symbolic speech, the district court applied the principles set forth in *Tinker v. DesMoines Independent School District*, 393 U.S. 503 (1969), and *Spence v. Washington*, 418 U.S. 405 (1974). Having found the elements of symbolic expression present, the court then applied the four part test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), to determine whether the State's interests in displaying the motto on non-commercial plates were sufficient to restrict the Maynards' freedom of expression. The court found that the government regulation failed the third and fourth requirements set out in *O'Brien* in that the regulation was directly

related to the suppression of free expression and that the motto was not required for purposes of identification, noting that other means were available to the State to preserve its interests in facilitating vehicle identification.

In considering the competing claims advanced by the parties, the presence of certain additional factors which this Court deemed important in *Spence v. Washington, supra*, should be noted. First, title and possession of the license plates are vested in the owners. In a technical property sense they are not the property of the government even though the latter retains control over their use and disposition. Second, the Maynards are required to affix the plates to their private property. Third, the Maynards engaged in no disorderly conduct or activity likely to result in a breach of the peace. Fourth, they do not ask for permission to mutilate or destroy their license plates but only to put removable tape over a non-functional part of the plate.[30] Finally, this is not a case that may be analyzed in terms of reasonable time, place or manner restraints on access to a public area. *See Virginia Pharmacy Board v. Virginia Consumer Council*, ___ U.S. ___, 48 L.Ed.2d 346, 363-64 (1976).

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[30]The Maynards first taped over the motto on their license plates in March or April 1974. Subsequently, Mr. Maynard cut out the words "Or Die" from the plates and covered the remainder of the slogan, as well as the resulting hole, with tape. The appellants make much of this in their brief. (App. Br. 25) In March 1975, after Mr. Maynard's release from jail and at about the time the federal court suit was filed, the Maynards were issued new registration plates. Mr. Maynard placed reflective tape over the mottos. (See Exh. 8) He did not, at that time, nor has he since, cut out any part of the motto as he did on the 1974 plates. (App. 28-29).

B. Symbolic Speech

Symbolic speech is nonverbal communicative conduct or expression intended to espouse an idea or express a certain viewpoint. The threshold inquiry is whether the particular activity engaged in by the Maynards is entitled to the protection of the First Amendment. This determination is made by objectively viewing "the nature of their activity, combined with the factual context and environment in which it was undertaken"; a standard requiring the "intent to convey a particularized message" and, from the surrounding circumstances, a "likelihood . . . that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. at 410-411.[31] The district court found that these elements were satisfied because (1) in using red reflective tape to cover the motto the appellees clearly intended to call attention to the fact that they deliberately obscured it because they disagreed with it, and (2) appellees' message was likely to be readily understood by other New Hampshire citizens.

[31]The following criteria have been considered helpful in defining the symbolic conduct. "First, the conduct should be assertive in nature. This will generally mean that the conduct is a departure from the actor's normal activities and cannot adequately be explained unless a desire to communicate is presumed. Second, the actor must have reason to expect that his audience will recognize his conduct as communication. Third, communicative value does not depend on whether the idea sought to be expressed can be verbalized. The symbolism or medium may be an idea in itself." Note. 68 Colum. L. Review 1091, 1117 (1968) quoted in *United States ex rel. Radich v. Criminal Court of New York*, 385 F. Supp. 165, 173 n.33 (S.D.N.Y. 1974).

It should not require extended discussion to establish that the motto "Live Free or Die" holds "obvious political and philosophical significance for many." *Maynard v. Wooley*, 406 F. Supp. at 1386 n.10. It is a different species from slogans such as "Famous Potatoes" or "Sportsman's Paradise" or "Seat Belts Fastened?" which adorn license plates in other states. (App. Br. 27) Such slogans do not promote a particular point of view or compel any given orthodoxy. They are ideologically neutral. *See Katz v. Department of Motor Vehicles*, 32 Cal. App. 3d 679, 685-86, 108 Cal. Rptr. 424, 428 (1973). "Live Free or Die," on the other hand, is not a neutral statement but is practically a call to arms. Whatever it may mean to others, it is contrary to the Maynards' Christian training and belief. (App. 25-26)[32]

Appellants argue that *Tinker* and *Spence* are inapposite because the conduct involved in those cases derived communicative quality from the Vietnam War. (App. Br. 26) They claim that in the case at bar, the Maynards' conduct is directed at an object having symbolic significance far less than that of the flag. They assert that the meaning of "Live Free or Die" is ambiguous and that *a fortiori* no "particularized message" could be conveyed by covering it. Finally, they suggest that the meaning of a symbolic act must be apparent at the time it is made and that the

[32]The Maynards believe in God's Kingdom. To them life is more precious than freedom. They would rather live in bondage than give up their lives for freedom. (App. 28) Mr. Maynard testified that, "By taping it over [the Motto], I have made a public declaration of my faith for my salvation." (App. 26) He testified that if he would give up his life for a political system he "would be giving up the hope of everlasting life." (App. 27) "If I give my life to the State or encourage other people to do it, would the State give it back to me? No. But God will. So, therefore, I will not support that slogan." (App. 28)

intended meaning cannot be explained by the testimony of the actor at his trial. (App. Br. 26)

While the existence of a war may be significant in providing a backdrop for an act of symbolic speech, it goes primarily to the question of whether the message is likely to be understood, and not to whether the actor intended to convey a message. Here, where the State has required many of its citizens to display a politically loaded slogan on their private property, there can be no doubt that the act of covering that slogan over with bright red tape is designed to convey opposition to it.[33] As George Maynard testified, the bright reflective red tape was effective in bringing attention to what they were doing. (App. 29)

Appellants contend that the phrase "Live Free or Die" is ambiguous and therefore no particularized message could be conveyed by covering it. Yet the dominant message conveyed is that political freedom is the greatest good and that it is better to die than to live under tyrannical rule. Covering over this motto when it is required to be displayed is a clear statement that one disagrees with it.

Appellants say that "but for the *post facto* courtroom explanation by Mr. Maynard of his conduct,

[33]The Maynards' activity is more plainly symbolic expression conveying a particularized message than the conduct of Mary Beth Tinker in wearing a black armband to protest the war, or Harold Spence in affixing a peace sign to his flag. This is because unlike these cases, the Maynards' conduct derives its meaning from the State motto itself. By covering the words "Live Free or Die" the Maynards are engaging in activity that is closely akin to pure speech. *Tinker v. DesMoines Independent School District*, 393 U.S. 503 (1969). Obviously if the statute as applied to the Maynards fails to meet the *O'Brien* test it would necessarily be unconstitutional if their activity is viewed as pure speech. *Goguen v. Smith*, 471 F.2d 88, 100 n.18 (1st Cir. 1972), *aff'd on other grounds*, 415 U.S. 566 (1974); *Radich*, 385 F. Supp. at 174 n.34.

his conduct in fact would be pure whimsey." (App. Br. 26)[34] To the extent that this suggests that an act of symbolic speech cannot be explained by testimony at trial, it is frivolous. This Court has frequently emphasized the importance of such testimony. *Spence v. Washington, supra; Cohen v. California*, 403 U.S. 15, 16 (1971); *see Smith v. Goguen*, 415 U.S. 566, 592-93 (1974) (Mr. Justice Rehnquist, dissenting). If the appellants' argument is intended as an indirect assualt on Mr. Maynard's sincerity, that issue was resolved in Maynard's favor in the lower court.[35]

It cannot be doubted that in taping over the motto, the Maynards intended to make a particularized statement of their strong opposition to the credo "Live Free or Die." The real thrust of the appellants' argument is that even if the Maynards had such an intent, their action was not capable of being understood by those who viewed it. They base this argument on the assumption that there is no "general universal interpretation" of "Live Free or Die" and no issue of

[34]Even without his testimony it would be obvious that deepfelt feelings motivated Mr. Maynard: Not many individuals would choose jail over payment of fines which he deemed utterly incompatible with his religious beliefs. *West Virginia Board of Education v. Barnette*, 319 U.S. at 643 (Black and Douglas, JJ, concurring).

[35]Appellants sought to show that Mr. Maynard had been disfellowshipped and that other Jehovah's Witnesses do not object to the motto. (App. 40-42) The court believed Mr. Maynard to be sincere in his belief. The truth or falsity of an individual's religious beliefs as opposed to the sincerity of the individual believer, is no concern of the court's. *United States v. Ballard*, 322 U.S. 78, 86-88 (1944). Nor is it material that the Maynards' views are not shared by any or all of their co-religionists. *Biklen v. Board of Education*, 333 F. Supp. 902, 905-906 (N.D.N.Y. 1971) *aff'd.* 406 U.S. 951 (1972).

great public moment to infuse it with meaning. This cramped interpretation would eviscerate the doctrine of symbolic speech.

The Maynards' conduct was not undertaken in a vacuum. In New Hampshire, controversy over the motto has raged for years. In *State v. Hoskin, supra,* the New Hampshire Supreme Court upheld the convictions of two people who objected to having the motto on their license plates. The hearing before the three-judge court in this very case was delayed for eight months while the New Hampshire General Court considered a bill that would have made inclusion of the motto on license plates optional with the car owner. (Docket entries 16, 17.) It is not likely that observers seeing the Maynards' bright tape would fail to get the message. *Maynard v. Wooley,* 406 F. Supp. at 1387 n. 11.

In *Tinker* and *Spence,* this Court stressed the importance of the context in which a symbol is used because wearing a black armband or putting a trident enclosed in a circle on a flag has no intrinsic significance. The war gave that conduct meaning. It is self-evident that when one covers over an explicitly worded slogan, the display of which is known to be required by the State, people will understand that the actor finds the slogan offensive.[36] In this connection, Mr. Maynard testified that the reason he used reflective tape was because of its effectiveness in drawing attention to his act:

[36]If the State required license plates to bear the words "Support Abortions" or "Amnesty Now" there would be no difficulty in understanding the opposition of someone who taped it over.

> "A. The reason for it is that people will recognize what I am doing, which is very effective. A lot of people stop me. And one person says 'You can't do that. That's against the law.' I says 'Fortunately, I was given permission by the Federal Court in a temporary injunction against the State.' And here I was able to converse with him and express my beliefs and my reason for doing so. And so, therefore, I was able to bear witness to the truth of God's Kingdom." (App. 29)

As the flag cases make clear, the fact that the primary symbol may mean many things to different people does not mean that symbolic expression cannot take place. No one would know by looking at his flag that Spence was protesting the Kent State tragedy and the Cambodian incursion as well as the war in general. But a person who saw his flag could not "miss the drift"[37] of his point and might be inspired to talk with him and gain a deeper understanding of what his symbolic protest was about.

The Maynards' actions are not simply one form of speech – their actions are the most effective form of expression they could choose. Through the simple act of taping over the motto with brilliant red tape, they are able to convey their message even to other motorists driving by at 55 mph. That act employs the same medium and reaches the same audience that the State does in promulgating its message. It has an impact that the Maynards could not achieve via more conventional forms of expression. Velvel, *Freedom of Speech and the Draft Card Burning Cases,* 16 Kan. L. Rev. 149, 153 (1968). Mr. Maynard testified that although there were other avenues of expression open to him, such as giving a speech, they were not as "positive" as the means chosen. (App. 39) Because of

[37]*Spence v. Washington,* 418 U.S. at 410.

his ninth grade education he is handicapped in his writing ability. (App. 37). However, he is conversant in sign language. His testimony at trial demonstrates his natural inclination to think in terms of symbols and to convey his thoughts by means of symbolic speech. (App. 36-39)

Finally, the environment in which the Maynards engaged in their expressive conduct (the highway) was not a public area where the state necessarily has some power to restrict expressive activity because of strong countervailing interests. *Cline v. Rockingham County Superior Court*, 502 F.2d 789, 791 (1st Cir. 1974).

C. The Interests of the State of New Hampshire

The appellants advance two categories of state interests which, they claim, are promoted by the requirement that New Hampshire passenger cars display license plates bearing the words "Live Free or Die": (1) promoting appreciation of history, state pride, individualism and tourism; and (2) facilitating vehicle identification. In considering whether these interests are sufficiently substantial to override the Maynards' First Amendment rights, it is important to recognize that the issue presented by this case is not whether a state can enforce a statute making it unlawful to deface a motor vehicle registration plate. It is, rather, whether a state can require license plates to bear a slogan with political or ideological meaning and forbid individuals, to whom the plates are issued, from covering the slogan even though they may vigorously disagree with it. It must be clear that the interests that the state advances will actually be compromised unless punitive action is taken

in the case at hand. *Spence v. Washington, supra; Cline v. Rockingham County Superior Court, supra; United States ex rel. Radich v. Criminal Court of New York*, 385 F. Supp. 165 (S.D.N.Y. 1974).

1. The State's interest in promoting pride, appreciation of history, individualism and tourism.

This Court has held that if the interest advanced by the State is not unrelated to the suppression of free speech, then the four-part test[38] set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) is inapplicable. *Spence v. Washington*, 418 U.S. at 414 n.8; Note, 8 Loyola L. Rev. (L.A.) 689, 706-707 and n.81 (1975). Under such circumstances, the balancing test applied when pure speech is involved, is triggered. *Id.*

It is apparent that the governmental interests in promoting pride and associated interests attempting to influence attitudes, are directly related to the suppression of free expression. By requiring the placement of the motto on license plates and prosecuting those who obscure the motto as an expression of their dissent, the State ensures the widest possible dissemination of the message contained therein. Since the government's interest is to prevent individuals from interfering with the transmission of the State sponsored message through the medium of symbolic expression, it

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[38] "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* 377.

is not "unrelated to the suppression of free speech." *See* Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. Rev. 29, 56-57 (1973).

Thus, even if the State's interests in promoting pride, etcetera are valid, the *O'Brien* test is inapplicable. If First Amendment balancing is undertaken, the appellants' concession that these interests can be served by alternative means is dispositive. The State's interests cannot be of "compelling" importance under those circumstances.

Even if this Court were to find that these asserted interests are unrelated to the suppression of free speech, they would still fail to meet the other three elements of the *O'Brien* test. First, it is not the business of government to attempt to shape public opinion nor to seek to instill certain beliefs in the minds of individuals. "Authority here is to be controlled by public opinion, not public opinion by authority." *West Virginia Board of Education v. Barnette*, 319 U.S. at 641. Indoctrination and propagandizing of political views are outside the power of government in a free society. Thus, it is beyond the constitutional power of government to require that a particular nationalistic or political message be displayed by a citizen just as it is beyond the power of government to require a person to own a flag or to salute it. *Spence v. Washington*, 418 U.S. at 422; *West Virginia Board of Education v. Barnette*, 319 U.S. at 642.[39]

[39]The government can require all dwellings in a city to display a number identifying the address of the building. *Quaere*, could the state require every dwelling house to display a plaque with the legend "Live Free or Die" or "In God We Trust" together with the numerals?

Second, even if it may be argued that placing the motto on license plates furthers the interests of creating state pride, identity and individualism, it does not necessarily follow that these interests are advanced by punishing dissenters. If anything, such State interests are promoted by allowing freedom of expression. It is paradoxical for the State to argue that the motto is placed on license plates to foster individualism and at the same time claim the right to punish those who act as individuals.

The State's argument that having the motto on the license plates furthers its interest in promoting tourism is particularly thin. Its reliance on *Froslid v. Hults*, 248 N.Y.S.2d 676, 20 A.D.2d 498, *appeal dismissed*, 14 N.Y.2d 722, 250 N.Y.S.2d 68, 199 N.E.2d 166 (1964), is misplaced. While it can be argued that putting "World's Fair" on the State's license plates might induce people to visit the State, "Live Free or Die" is a totally different kind of message. This claim would only make sense if the plates said "Old Man in the Mountain" or something similar having tourist appeal. Moreover, the New York World's Fair, although operated by a private corporation, was for the public good. All revenues from the fair which remained after its obligations were discharged went to the city for restoration and improvement of Flushing Meadow Park and the remaining balance was to be used by the city

for educational purposes. *Id.* at 679.[40] In any event, there is no evidence in the record that including the motto actually promotes tourism or that preventing the Maynards from taping over the motto would decrease tourism.

With respect to the fourth element of the *O'Brien* test, appellants concede that it is possible for the State of New Hampshire:

> "to foster appreciation of State history and tradition by massive educational efforts, to create state pride, identity and individualism by holding patriotic oriented events, and to promote state tourism by the expenditure of additional monies for customary promotional advertising." (App. Br. 24)

Appellants argue, however, that their burden is met by showing only that their interests cannot be served as efficiently as they are by the means which they have chosen. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 at 1484-85 (1975). With all deference to Professor Ely, nothing in *O'Brien* suggests that the Court was employing a diluted version of the "less restrictive alternative" test. In fact,

[40]Aside from these factual differences, there are important legal distinctions as well. *Froslid* did not involve any claims based on the First Amendment. Central to the court's decision was its view that driving is a privilege, not a right, and that since the state could deny the privilege altogether, it "may prescribe conditions under which it shall be exercised." 248 N.Y.S.2d at 681. In the instant case such a theory would amount to conditioning access to public highways upon the advertising of a prescribed sentiment. This a state may not do, just as it may not condition attendance at school upon saluting the flag and reciting the pledge of allegiance. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943); *Sherbert v. Verner*, 374 U.S. at 404-405 & n.6.

the Court stressed that the non-possession regulations, which were offered as an alternative, protect "overlapping but not identical governmental interests" and "reach a different class of wrongdoers." *United States v. O'Brien*, 391 U.S. at 380. The Court could perceive no alternative means that would "more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction." *Id.* 381.[41]

In this case, as the district court held, there are alternatives available to the State which could "more precisely and narrowly" assure the preservation of its interests. *Maynard v. Wooley*, 406 F. Supp. at 1388. If the State wants to use a slogan calculated to raise strong emotions, it must be prepared to accommodate individuals who strongly disagree with it.

2. The State's interest in facilitating motor vehicle identification and law enforcement.

The appellees recognize that the State has a valid governmental interest in creating a system of motor vehicle identification. However, that interest is not furthered, either on its face or as applied to the Maynards, by requiring the State motto to be displayed

[41]The lower courts have not read *O'Brien* as creating a different standard of the less restrictive alternative test. *See, e.g., James v. Board of Education*, 461 F.2d 566, 574 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972); *A Quaker Action Group v. Morton*, 460 F.2d 854, 860 (D.C. Cir. 1971); *Nolan v. Fitzpatrick*, 451 F.2d 545, 548 (1st Cir. 1971); *United States v. Chalk*, 441 F.2d 1277, 1280-81 (4th Cir.), *cert. denied*, 404 U.S. 943 (1971); *Eisner v. Stamford Board of Education*, 440 F.2d 803, 806 (2d Cir. 1971); *Nixon v. Administrator of General Services*, 408 F. Supp. 321, 368 (D.D.C. 1976); *Doe v. Martin*, 404 F. Supp. 753, 759 (D.D.C. 1975).

on passenger cars. Unlike the numerals and the words "New Hampshire," the State motto is non-functional. This is apparent from the facts (1) that at various times in the past, different slogans have adorned the State's license plates (App. Br. 16) and (2) that even now, many of the State's plates do not bear the motto. (App. 66) The State concedes that "it is possible for the State of New Hampshire to establish a workable motor vehicle registration system without utilizing the state motto on license plates, . . ." (App. Br. 24) The requirement that the letters of the motto shall not be obscured does not further any important or substantial governmental interest. In fact, the State's argument is something of a self-fulfilling prophesy: The motto is important to the motor vehicle system only because it is a part of the plate design.

Even if it is assumed that the second element of the *O'Brien* test is facially valid, the record in this case demonstrates that identification of the Maynards' vehicle is not impaired by taping over the motto. Lebanon Police Chief Neil Wooley testified that with tape across the motto he cannot tell whether a non-commercial vehicle has proper plates on it or whether, in fact, someone has made a so-called "screwdriver transfer" of other plates (e.g. trailer plates) to a vehicle. (App. 56-57) However, Frederick Clarke, the State Commissioner of Motor Vehicles, testified that only non-commercial, so-called passenger, vehicles have plates like the Maynards' containing two letters and three numbers. Thus, Clarke testified that the taping of the motto on the type of plate issued to the Maynards does not impair identification of the vehicle.

(App. 53)[42] As found by the court below, the State failed to prove that any other non-passenger motor vehicle has the same license plate number as the Maynards'. *Maynard v. Wooley*, 406 F. Supp. at 1388 n.13. In any event, it is apparent that the State's interest in identification could best be served by applying the words "passenger" or "non-commercial" instead of the politically charged motto "Live Free or Die."

Appellants would sustain the State's interest under the third element of the *O'Brien* test by analogizing the legal requirement of 31 U.S.C. §324-a that our National Motto – "In God We Trust" – appear on all coins and currency. Appellants contend that just as obscuring the national motto would tend to defeat the establishment of a uniform national monetary system, obscuring the state motto on license plates defeats the establishment of a uniform state motor vehicle registration system.

This analogy fails because coins and currency bearing the motto "In God We Trust" are not items that must be prominently displayed on private property. Currency

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[42]Chief Wooley stated that "without the words (the motto) or some distinguishing marks, it becomes more difficult for a police officer to visually look at a car and a plate, or whatever the vehicle may be, and determine whether or not that plate may, in fact, belong on that vehicle". (App. 57) Since the words "Live Free or Die" are barely larger than 1/2" in size and the true identifying letters and numbers are approximately 2" and 2-7/8" respectively, in size, logic dictates that any law enforcement officer would identify the plate as belonging to a passenger vehicle from the larger identifying letters and numbers prior to clearly viewing the motto. As to distinguishing plates from other states with similar colors, the fact is that stamped at the bottom of the plates in plain view are the words "New Hampshire."

is the "coin of the realm" – not of the individual. It is a mechanism for purchasing commodities in the market place and does not impute a controversial belief to the individual. Even if an individual felt so strongly about the national motto that he insisted on removing the motto from every coin in his possession, he would not be criminally liable. Liability to prosecution for obliterating the motto requires an intent to defraud. *United States v. Sheiner*, 273 F. Supp. 977 (S.D.N.Y. 1967) *aff'd.* 410 F.2d 337 (2nd Cir.) *cert. denied* 396 U.S. 825 (1969); *Barnett v. United States*, 384 F.2d 848 (5th Cir. 1967); *United States v. Lissner*, 12 F.2d 840 (Mass. 1882).

The district court found it unnecessary to decide whether the third element of *O'Brien* was satisfied because it held that the restriction on the Maynards' First Amendment activity was greater than essential to the furtherance of the State's interest in motor vehicle identification. If the State's interest is to distinguish certain passenger cars from other vehicles, it is not necessary to use code words to accomplish this objective. The State's aim could be achieved by more precise and narrow means, namely, placing the words "Passenger" or "Non-commercial" on the plates, and the State would lose nothing by it. Thus, even if Professor Ely's thesis were accepted that the state need not adopt means which are less efficient, that would have no application here.

V.

The Maynards have a right to be free from any required affirmation of belief under the First Amendment and may not be compelled to display the state motto on their private property.

Since the federal district court upheld the Maynards' contention that their acts constituted constitutionally protected symbolic speech, it did not consider their further contention that they have a right under the First Amendment to be free from compelled affirmations of belief.[43] The appellants have chosen not to brief this argument, but rely instead on the New Hampshire Supreme Court's decision in *State v. Hoskin, supra.* There, the court apparently took judicial notice of the fact that words and devices on license plates are not regarded as statements of the car owner and that the presence of the motto does not presume endorsement of the message. (App. Br. 18).

Every man has a right to be free to form his own beliefs and to communicate those beliefs to others. Under our constitution, no man, no group of men, nor any branch of government may force another to adopt prescribed beliefs, nor compel a man to declare a belief he does not hold. Mr. Justice Jackson, speaking for this Court in *West Virginia State Board of Education v. Barnette, supra,* stated:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics,

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[43]Judge Bownes would have also rested the decision on this ground. 406 F. Supp. at 1396 n.9.

nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." [Footnote omitted.]

"We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." 319 U.S. at 642.

As in *Barnette* the freedom asserted by the Maynards "does not bring them into conflict with rights asserted by any other individual." *Barnette*, 319 U.S. at 630. "Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual." *Id.*

Taken in combination, RSA 263 and 262:27-c force citizens of New Hampshire to profess a belief and foster a point of view that many disagree with. The Maynards object to advertising a belief they find repugnant. Because their objections to the motto are based on their religious beliefs, they find the requirement that they display the motto especially oppressive, and that oppression grates on them on a continuing basis.[44]

[44]To some extent justifications for freedom of speech duplicate those for religious freedom. Occasionally, the courts have considered the interests closely intertwined. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Murdock v. Penna.*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Biklen v. Board of Education*, 333 F. Supp. 902, 906 n.6 (N.D.N.Y. 1971) *aff'd* 406 U.S. 951 (1972). Nevertheless, they embody distinct interests. Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. at 336. Appellees' complaint stated a separate cause of action for the free exercise claim and the argument is briefed separately here.

The State argues, on the basis of *State v. Hoskin*, *supra*, that everybody knows that display of the motto is required by the State and that therefore it carries no implication of endorsement. This stands *Barnette* on its head. The issue is not what viewers might think but, rather, whether it is offensive to the Maynards to advertise the slogan. It could be said of the flag salute and pledge of allegiance that since everyone knows it is required, its recital is of no moment. The whole point of *Barnette* is that the state cannot require its citizens to affirm a creed with which they disagree. The State may not compel acquiescence "by word or act." *Id.* 642. *See Goetz v. Ansell*, 477 F.2d 636, 638 (2d Cir. 1973); *Russo v. Central School District No. 1*, 469 F.2d 623, 626 (2d Cir. 1972). As the court said in *Barnette*, "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind left it open to public authorities to compel him to utter what is not in his mind." 319 U.S. at 634. That is precisely the situation here.[45]

[45]Cases sustaining the constitutionality of loyalty oaths are not germane. *See, e.g., Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971); *Bond v. Floyd*, 385 U.S. 116 (1966); *American Communications Association v. Douds*, 339 U.S. 382 (1950) (equally divided Court); *Biklen v. Board of Education*, 333 F. Supp. 902 (N.D.N.Y. 1971) *aff'd.* 406 U.S. 951 (1972); *Knight v. Board of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd. per curiam*, 390 U.S. 36 (1968). A loyalty oath requiring public employees to support the ideals of our Constitution is far different than a law requiring a private citizen to proselytize the view that one should "Live Free or Die." Also, the threatened criminal penalties in this case (imprisonment not to exceed one year and a fine of one thousand dollars) are in no way comparable to the loss of a teaching post. *Biklen*, 333 F. Supp. at 906. Finally, Article VI,

(continued)

In view of the State's concession that it is possible to serve its interests without utilizing the motto on license plates (App. Br. 24), it is clear that the Maynards' right to be free from a required affirmation of belief must prevail.[46]

VI.

The prohibition against taping over the state motto as applied to the Maynards violates the Free Exercise Clause of the First Amendment.

The Maynards' refusal to display the State motto is based upon their most deeply held religious beliefs. The truth of these beliefs must be accepted (Note 5, *supra*). This Court has repeatedly held that the First

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(footnote continued from preceding page)
Cl.3 of the Constitution itself mandates that all legislative, executive and judicial officers take an oath to support the Constitution. There is no similar requirement with regard to the state motto. As Mr. Justice Douglas said, concurring in *Speiser v. Randall*, 357 U.S. 513, 536 (1958):

> "All public officials - state and federal - must take an oath to support the Constitution by the express command of Article VI of the Constitution*** But otherwise the domains of conscience and belief have been set aside and protected from government intrusion. *Board of Education v. Barnette*, 319 U.S. 624."

[46]The fact that there may be alternative means available to the Maynards to express their dissent from the motto is immaterial. *Spence*, 418 U.S. at 411 n.4; *See Cohen v. California*, 403 U.S. 15 (1971); *Schneider v. State*, 308 U.S. 147, 163 (1939).

Amendment freedoms are closely intertwined. "This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience." *Thomas v. Collins*, 323 U.S. 516, 531 (1945). *Accord Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971); *Schneider v. Smith*, 390 U.S. 17, 25 (1968). While there is considerable overlap, the issues are still analytically distinct. In fact, the notion that a person should not be compelled to speak what is not in his mind would seem to be more compelling when his belief touches on sensitive questions of faith. When the state violates a man's religion or conscience it often works an exceptional injury to him which, unless compelled by most pressing social needs, "constitutes a moral wrong in and of itself, far more than would the impairment of his freedoms of speech, press or assembly." Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. 327, 337 (1969).

The purpose of the Free Exercise Clause is "to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963). "And even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims." *Gillette v. United States*, 401 U.S. 437, 842 (1971); *Sherbert v. Verner, supra.*

Thus, in *Sherbert v. Verner, supra*, this Court held that a state cannot withhold unemployment compensation from a worker who was discharged because of her refusal to work on Saturdays in violation of her religious beliefs. Such a course, if it were permitted,

would require the worker "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." 374 U.S. at 404. *Accord Lincoln v. True*, 408 F. Supp. 22 (W.D. Ky. 1975). The Maynards are in the same predicament: Their ability to operate their car in New Hampshire is conditioned on their abandoning their conscientious opposition to the State motto. In the absence of a compelling State interest, the individual's religious views should be accommodated. *Sherbert v. Verner*, 374 U.S. at 403; *NAACP v. Button*, 371 U.S. 415, 438 (1963).[47]

It has been suggested that when, because of compelling conscientious belief, an individual refuses to perform any duty of positive action established by the State, the individual claiming the protection of the Free Exercise Clause should be aided by a presumption that the State can "satisfy its needs either by performing the act on his behalf or by placing upon him an alternative

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[47]In judicial proceedings, the courts respect the rights of those who have conscientious scruples against oath taking by permitting them to make affirmation in any mode which they declare to be binding upon their consciences. The dual purposes of the oath are to impress the witness with the solemnity of the occasion and to safeguard against perjury. These objectives can be served equally as well without offending the witness' religious convictions.

By the same token, the vital function of a system of autombile registration is to identify motor vehicles in case of accident or violation of law and to secure the efficient collection of revenue. *Bosen v. Larrabee*, 91 N.H. 492, 23 A.3d 331, 332 (1941). These objectives are served whether or not the motto is displayed on the license plate. The ancillary objectives of promoting pride, etc. are of lesser stature and should not take precedence over an individual's religious preferences.

burden of equal weight, or both." Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L. Rev. at 345. Only if the presumption is overcome should the balancing of interests be resorted to. *Id.* This standard should be applied in the instant case. The Maynards have indicated their willingness to purchase special plates from the State without the State motto. It takes the State between ten to thirty days to make "vanity plates" on special order at an extra cost of $5.00. It would be possible to remove the die that says "Live Free or Die." (App. 55-56) Thus, the presumption favoring the individual could not be overcome on this record.

If this test is not adopted, the court must weigh the competing interests of the parties. Balancing the interests of the Maynards *vis a vis* the State of New Hampshire is made easier in this case by the State's concession that it could establish a workable motor vehicle registration system without utilizing the State motto on license plates. (App. Br. 24) While the articulated State interests themselves might be considered weighty, the necessity of using the State motto is not, and the impact that an exemption for religious reasons would have on the overall regulatory program is slight. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1390 (1967).

Against the State's interest must be contrasted the "sincerity and importance of the religious practice for which special protection is claimed and the degree to which the governmental regulation interferes with that practice." *Id.* The sincerity of the appellees has been resolved in the district court. The requirement that they display the words "Live Free or Die" on their private

automobiles compels the Maynards to be active participants in the dissemination of a creed to which they are religiously opposed. The Maynards live their lives to serve Jehovah. Jehovah is a preserver of life. They believe that life is more important than freedom. They believe that the gift God gives is everlasting life and that humans who serve Jehovah will attain everlasting life. The creed that they feel compelled to endorse, *i.e.*, that one should "Live Free or Die," is directly opposed to the precepts of their religion.

CONCLUSION

For the foregoing reasons, the judgment of the district should be affirmed.

Respectfully submitted,

RICHARD S. KOHN
Suite 526
733 Fifteenth Street, N.W.
Washington, D.C. 20005

for

The New Hampshire Civil
Liberties Union, Inc.
3 Pleasant Street
Concord, New Hampshire 03301

JACK B. MIDDLETON
R. DAVID DePUY
McLane, Graf, Greene, Raulerson &
Middleton Professional Association
40 Stark Street
Manchester, New Hampshire 03105

Attorneys for the Appellees

Of Counsel:

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

By: /s/ Jack B. Middleton
Jack B. Middleton

Appendix A

TRANSCRIPT OF PROCEEDINGS

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

NEAL R. WOOLEY, individually and as Chief of Police, Lebanon, New Hampshire; PAUL A. DOYON, individually and as Director of the New Hampshire State Police; FREDERICK N. CLARKE, JR., individually and as Commissioner of the New Hampshire Department of Motor Vehicles, Appellants.	)	
v.	)	Civil Action No. 75-57
GEORGE MAYNARD AND MAXINE MAYNARD, Appellees.	)	

Transcription of Plaintiff's Exhibit No. 3

December 6, 1974
Lebanon, N.H.

(Preceding material inaudible.)

The defendant, GEORGE MAYNARD, after having been first duly sworn, made the following statement:

DEFENDANT: If the Court permits, may I have a recording here of my statement, if I may. I don't have an opportunity to have a stenographer here at this time,

and so I would like to record my testimony for my future references if I may.

JUDGE: That is what you're going to testify to now?

DEFENDANT: Yes, sir.

JUDGE: That's all right.

DEFENDANT: If I may mention to your honor my reason for taking the tape off, taping up the the number plate, is that I felt my Christian conscience had been bothering me. The thing is, your honor, I've been born in this country, I received an inheritance. And this inheritance of religion, of language, and also country, which is of none of my choice, but it was an inheritance through my parents.

When I grew up I found out that this inheritance became contaminated in these different fields. In other words, just like if I inherit a well from great grandparents, I will not drink from it if it becomes contaminated because I inherit it.

And so, I'm studying the Bible, I found that life is very precious and is a gift from God. And therefore the inheritance that I received from my parents was also death, sickness, and disease. And it showed that it has no purpose in life if the ultimate is vanity.

And so in studying the Bible I found out that Jehovah God has a purpose for us, a new inheritance, which is not corruptible. And therefore, by studying the Bible, which I have with me, it states that this means everlasting life, they're taking the knowledge of the only true God, the one who sent forth Jesus Christ.

And so my conviction –

JUDGE: Well, let me interrupt you for just a minute. What you are stating in the court is that, by reason of some religious belief, this is why you did this. Is that correct?

DEFENDANT: Yes, sir, your honor. The thing is that I'm not a voter of – I'm not a supporter of this government, of this system. My allegiance is to God. And therefore I do not support the political system of this country. I abide by the laws. As the authority you, your honor, are in the authoritative position permitted by God. And therefore, I have to be subjected to you. So when the laws of man conflict with God's laws, then I have to obey God rather than man. And therefore, the slogan Die–Live Free or Die, is against my teaching and my belief. Because life is more valuable than freedom, to me. Whereas the slogan says, either live free or die.

And I teach otherwise. Man is made to live forever. Man is not made to die. So therefore I can't support the slogan that the state has put on the motor vehicle.

JUDGE: Well, I understand what you're saying as far as by reason of your religious beliefs, you took this action on your own here, and it's not –

DEFENDANT: I'm not – I'm not –

JUDGE: – that you want to necessarily disobey the law, but you can't live with that, and the fact that your religion is such.

DEFENDANT: Yes, sir, that is correct. I'm not representing here any particular group. I'm making my own personal plea in my own defense of my conscience. The other Jehovah Witnesses may feel otherwise.

JUDGE: All right, all right. What I want you to understand is, I'm a constitutional officer as well. I'm obliged to do what I'm sworn to do.

DEFENDANT: Yes, sir.

JUDGE: And I don't make those laws.

DEFENDANT: Yes, sir.

JUDGE: All I do is interpret them, and try to give everybody a fair trial here in applying the law to the facts of each case.

DEFENDANT: Yes, sir.

JUDGE: And the law is set forth by the legislature. They tell me what's right and what's wrong. If somebody disobeys it, why, if the facts are such that they come within the framework of that law, then I have to apply that law to them.

DEFENDANT: I see.

JUDGE: And as a matter of fact, I had a case similar to this which went to the Supreme Court direct from this court. In the case *State vs. Hoskin*, 1972, and it's reported in volume 112 N.H. page 332, in which the Supreme Court of our state said this: defendant who placed tape over the state motto on their license plate thereby preventing it from being seen, violated RSA Chapter 262:27-c, misuse of plates. The Supreme Court has directed this law to every judge in the state.

DEFENDANT: Yes, sir.

JUDGE: And it said that anybody who tapes over those words, that motto, is, in fact, violating the law.

DEFENDANT: I realize that sir.

JUDGE: So that's what we're all here for. And I can respect your position, respect your right to worship God as you see fit to do. But I don't want to delay the proceedings of this court, as long as I understand what your defense is. And what you're telling me is that by reason of your –

DEFENDANT: My conscience.

JUDGE: – religious –

DEFENDANT: Conscience.

JUDGE: – conviction and your principle, is that right?

DEFENDANT: Well, the state is denying me the freedom of speech by passing a law, because it's somebody else's convictions.

JUDGE: All right. So I understand it. I think I've got all the facts correctly here. And I've explained to you what the law is.

DEFENDANT: Yes, sir.

JUDGE: Are there any questions you want to ask the witness?

DEFENDANT: One more point, your honor. If the state of New Hampshire insists on this law, what they're doing, they're putting themselves above God. Because I give my allegiance and my pledge to God. And therefore if the state wishes to cause a hardship on my Christian conscience –

(End of proceedings as recorded.)